

Cornell Law School Library

Cornell University Library
KF 1250.H65 1874

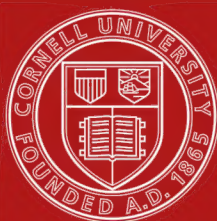
v.2

The law of torts or private wrongs /



3 1924 019 310 980

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

THE
LAW OF TORTS
OR
PRIVATE WRONGS.

BY
FRANCIS HILLIARD,
COUNSELLOR AT LAW.

FOURTH EDITION, GREATLY ENLARGED.

IN TWO VOLUMES.

VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1874.

M/18210.

Entered according to Act of Congress, in the year 1859, by
FRANCIS HILLIARD,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1861, by
FRANCIS HILLIARD,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1866, by
FRANCIS HILLIARD,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1874, by
FRANCIS HILLIARD,
in the Office of the Librarian of Congress, at Washington.

CONTENTS.

CHAPTER XXIV.

	PAGE
TRESPASS	1-25

1. Definition, and distinction from other analogous wrongs; how far a wrongful *taking* or *entry* is necessary.
6. Parties.
7. Pleadings; declaration; *continuando*, *liberum tenementum*, *license*, &c.
13. General defence, of property in the defendant.
15. Damages.
18. Trespass upon a dwelling-house; breaking of doors; search-warrant, &c.

CHAPTER XXV.

CONVERSION	26-72
----------------------	-------

1. What constitutes conversion and the foundation of an action of *trover*; unlawful taking, misuse, &c.
4. Conversion in case of *bailment*.
6. Goods obtained by *threats*, *fraud*, or *mistake*.
7. Breach of trust.
8. But there must be a conversion to one's own use; not mere negligence or other wrong.
11. Conversion in case of legal process.
12. Demand and refusal, when sufficient proof of conversion.
13. When insufficient; inability of the defendant to deliver the property; doubt of the plaintiff's title; detention by legal authority, &c.
15. Nature of the property converted; real estate; choses in action, &c.
19. Parties.
22. Pleading.
27. Damages.

CHAPTER XXVI.

FRAUD	73-86
-----------------	-------

1. Must be connected with *contract*.
2. General principles; what constitutes an actionable fraud.
5. Fraud of a *seller*.
7. Fraud of *purchaser*; whether creditors and subsequent purchasers are affected by such fraud; when a seller loses his right of action.
11. False recommendation of credit, &c.

CHAPTER XXVII.

WASTE 87-100

1. Applies only to real property.
2. Definition.
3. Felling of timber.
10. Disturbance of the soil; mines, &c.
11. Change in the use of land.
13. Buildings.
17. Remedies; parties; forms of action; injunction.

CHAPTER XXVIII.

INJURIES TO RELATIVE RIGHTS. — PUBLIC RELATIONS. —

OFFICERS OF THE LAW. — JUDICIAL OFFICERS 101-121.

1. Injuries to *relative rights*; by and against officers of the law; judicial officers.
4. Magistrates and Justices of the Peace; *judicial* and *ministerial* duties and acts.
11. Want of jurisdiction.
12. Malice, &c.

CHAPTER XXIX.

MINISTERIAL OFFICERS. — SHERIFFS, ETC. — GENERAL LIA-

BILITIES AS TO THE SERVICE OF PROCESS 122-159

1. General rights and duties of ministerial officers.
2. Jurisdiction, as affecting their liability.
4. Burden of proof; application of the rule "in pari," &c.
5. Justification of an officer, as depending upon the liability to seizure of person or property.
9. Title of an officer to property taken by him, and right of action therefor.
10. Actions against officers; form, &c.
11. Notice, before service of process. Purpose and intent, as affecting an officer's liability.
14. *Return* of process.
21. Rights and liabilities of a sheriff in connection with his *deputies*.
29. Justification of persons acting under an officer.
30. Liability of *parties* for the acts of officers.
34. Damages.

CHAPTER XXX.

ATTACHMENT AND EXECUTION 160-200

1. Attachment — nature and purpose of an attachment — an *alternative* remedy.
3. Officer's title to, and right of action for, property attached. Title of a *receiptor* or *keeper*.
4. Responsibility for failing to attach, or for property attached.
5. *Receiptor* and *keeper*.
10. Right to indemnity; attachment of the property of a third person, or property not subject to attachment.
15. Liability of the officer to the defendant in the suit.
16. Trespass *ab initio*.
17. Levy of execution upon property attached; duty and liability of the officer.

19. Successive attachments.
22. Sale, &c., of property attached.
24. Rights and liabilities of the sheriff in connection with the acts of his *deputy*.
25. Effect, upon an attachment, of the *death* of parties.
27. Property exempt from attachment.
28. Damages.
30. Rights and liabilities of officers in connection with *executions*. Suit by a purchaser of property.
31. Property exempt from execution.
32. Successive acts of a levy may be joined.
33. Trespass *ab initio*.
34. Levy upon the property of a third person.
36. Mode of levy, and instructions relating thereto.
37. *Return* of executions.
40. Payment of money collected on execution.
46. Title of an officer to property levied on, and right of action therefor.
48. Damages.

CHAPTER XXXI.

ARREST, BAIL, ESCAPE 201-216

1. Arrest.
2. Bail.
6. Escape.

CHAPTER XXXII.

MISCELLANEOUS PUBLIC OFFICERS 217-225

1. General official liability.
2. Clerks of courts.
3. *Voting*.
4. *Taxes*.
7. Highways.
9. *Military* officers.
10. Miscellaneous cases.

CHAPTER XXXIII.

JOINT TORTS OR WRONGS 226-272

1. Mutual rights and liabilities of parties jointly interested, as between themselves and in reference to others.
2. Suit of one joint owner against another. — Sale or destruction of the property.
3. Members of a voluntary association.
4. Tenants in common of real property; possession of one, when adverse to another.
5. Third person claiming under one tenant in common.
7. Suits by joint parties against third persons.
9. Suits against joint parties. — Trespassers.
- 9 *a*. Conversion.
- 9 *c*, 10 *c*. The question of joint liability is for the jury.
10. Qualifications of the general rule of joint liability. — Trespass.
- 10 *a*. Conversion.
- 10 *b*. Mistake.
12. Officers and parties in case of legal process.
16. Conspiracy.
20. Election of remedies; several suits, whether allowable; liability of different defendants in the same action; verdict; damages.
- 30 *n*. Liability of *partners*.

CHAPTER XXXIV.

CORPORATIONS 273-280

1. General liability of corporations for tort.
3. For what torts and in what actions corporations are liable.
4. Fraud, liability for agents, &c.
7. Refusal of subscription to new stock.
8. Expulsion of members.

CHAPTER XXXV.]

CORPORATIONS.—BANKS 281-292

1. General liability.
2. Negligence in collection of notes, &c.
5. Deposits.
12. Checks.
16. Liability for officers and servants.

CHAPTER XXXVI.

RAILROAD CORPORATIONS 293-355

1. General remarks.
2. General liability of a railroad.
3. Damages caused by the laying out of a railroad; mode of assessing such damages; whether the statutory remedy is exclusive; what damages are or may be included in the assessment.
9. Obstruction, &c., of streets and ways; horse-railroads.
18. Injury to watercourses; overflowing of land, &c.
21. Railroads are *common carriers*; their rights and liabilities as carriers of merchandise; effect of express notices; commencement, termination, and nature and degree of liability; delivery; connecting roads.
30. Rights and liabilities as carriers of passengers; *baggage*; import and effect of *tickets*; payment of fare; right to eject passengers.
40. Duty and liability as to *time*; damages for delay and detention.
41. *Free passengers*.
42. Liability in case of negligence or fault of the party injured; *in pari delicto*.
45. Liability of a railroad for injury done to animals.
47. Liability in case of death.
49. Liability of the company for the acts or neglect of its agents or servants; liability to its own servants; liability in case of lease, &c.
50. Miscellaneous rights and liabilities.

CHAPTER XXXVII.

CORPORATIONS; TOWNS; LIABILITY FOR DEFECTIVE HIGH-
WAYS 356-385

1. Municipal corporations; counties; towns; liability for *highways*; statute and common law; *parties and uses*, as connected with liability; indictment.
3. For what roads a town, &c., is responsible; *laying out*, use, &c.
4. *Safe and convenient*, meaning of the terms; what constitutes a *defect* or *obstruction*; a question for the jury.

7. Snow and frost.
8. Want of lights, guards, railings, &c.
9. Sidewalks.
10. Notice of defect; implied notice.
11. The plaintiff must not have been himself in fault; concurring or *primary* causes; defect of vehicle, &c.
12. Nature and proof of the injury.
13. Liability of a town, as affected by that of other parties; injuries caused by railroads, &c.
21. General nature of the action; pleadings, &c.

CHAPTER XXXVIII.

MISCELLANEOUS RIGHTS AND LIABILITIES OF MUNICIPAL AND OTHER SIMILAR CORPORATIONS 386-400

1. General liability of municipal corporations.
3. Rights and liabilities of corporations acting under express charters.
4. Form of liability, whether under the statute or at common law.
9. Rights and liabilities of individuals acting under express charters.

CHAPTER XXXIX.

OFFICERS, ETC., OF CORPORATIONS 401-404

CHAPTER XL.

MASTER AND SERVANT; PRINCIPAL AND AGENT 405-477

1. Whether master and servant are *jointly, alternatively, or successively* liable.
3. What constitutes a servant; action of trespass or case; negligence or wilful wrong; acts done in connection with the master's business; in his presence; liability by *ratification*.
11. Distinction between a *servant* and a *contractor*; case of *Bush v. Steinman*.
16. Liability of public officers.
17. Of corporations, &c.
18. Liability for fraud of an agent or servant.
20. Liability of a servant—to third persons.
22. To the master.
24. Liability of master to servant; case of *fellow-servants*.
27. Actions by master and servant against third persons.
28. Action by master for loss of service of the servant, &c.

CHAPTER XLI.

PRINCIPAL AND AGENT.—ATTORNEYS, ETC., AT LAW . . . 478-497

1. General liability of an attorney.
4. In reference to *suits*.
5. The collection, &c., of money.
6. *Securities and titles*.
7. Negligence, whether a defence to a suit for fees.
8. Liability to parties wrongfully sued.

CHAPTER XLII.

TORTS CONNECTED WITH THE RELATION OF HUSBAND AND WIFE	498-510
---	---------

1. Action by the husband alone.
3. By husband and wife.
5. By the wife alone.
6. Against husband and wife.
15. Mutual personal rights of husband and wife.
17. Action for criminal conversation or seduction, and for enticing away or harboring a wite.

CHAPTER XLIII.

PARENT AND CHILD	511-525
----------------------------	---------

1. Seduction; founded on the presumption of *service*.
3. In case of children under age.
4. Children of age.
5. Loss of service; proof and nature of.
6. By whom the action may be brought.
7. Form of action.
8. Defence.
10. Damages.
12. Enticing away, or abduction.
13. Other injuries to minor children.
15. Infants.

CHAPTER XLIV.

BAILMENT	526-532
--------------------	---------

1. Bailment is a *contract*.
2. Various kinds of bailment.
3. *Deposit*.
5. *Mandate*.
7. *Commodatum* — loan.
8. *Locatio* — hiring.
9. *Warehousemen*.

CHAPTER XLV.

BAILMENT. — INNKEEPERS	533-543
----------------------------------	---------

1. Degree of responsibility.
3. To whom responsible; for what property and for what time; *guests* and *boarders*.
4. Animals.
- 4 a. A guest's care of his own goods.
5. Loss from a party's own negligence.
6. Lien.

CHAPTER XLVI.

BAILMENT. — COMMON CARRIERS 544-602

1. Common carriers, who are.
7. Burden of proof.
8. To whom liable.
10. Delivery to.
11. Delivery by.
13. Nature of liability; exception of the *act of God*, &c.
18. Form of action against — *trover*.
19. *Notice*, as affecting liability.
26. *Custom* or *usage*.
27. *Passenger*-carriers.
28. Liability for *baggage*.
30. Injury caused by the passenger's own fault.
32. *Ferries*.
33. *Lien*.

CHAPTER XLVII.

LANDLORD AND TENANT 603-612

1. *Lease* and *mortgage*; torts relating to.
2. Actions by landlord and tenant against third persons.
- 3 *e.* By landlord against tenant.
4. By tenant against landlord.
8. By third person against landlord or tenant.
9. Forms of action by landlord and tenant against third persons — *trespass* and *case*.

CHAPTER XLVIII.

MORTGAGE 613-619

INDEX 621

INDEX TO CASES CITED.

VOLUME II.

A.		PAGE
Abbey v. Dewey	73	
v. Stevens	549	
Abbott v. Booth	207	
v. Holland	216	
v. Kimball	139, 151, 158, 174, 177	
Abercrombie v. Baldwin	233	
v. Chandler	147	
Abercromby v. Bradford	172	
Abington v. Lipscomb	50	
Abraham v. Munn	530	
v. Reynolds	468	
Abrahams v. Kidney	511	
Abrams v. Ervin	101	
Abtisdell v. Chicago	346	
Ackerley v. Parkinson	109	
Ackroyd v. Ackroyd	175	
Ackworth v. Kempe	188	
Adams v. Adams	508	
v. Balch	136	
v. Barry	498	
v. Carlisle	372	
v. Cressap	545	
v. Darnell	550	
v. Fox	478	
v. Freeman	18, 157	
v. Graves	251	
v. Hemmenway	409	
v. Loeb	576	
v. Logan	356	
v. McDonald	568	
v. Mizell	44	
v. Nock	577	
v. Page	258	
v. Reagan	576	
v. Saratoga, &c.	300	
v. Soule	78	
Adams Express Co. v. Haynes	586	
Addington v. Allen	82	
Addison v. Overend		239
Adler v. Fenton		258
Adwin v. New York		328
Agnew v. Johnson		229
Agricultural, &c. v. Commercial, &c.		284
Ainsworth v. Partillo		39
Aire v. Sedgwick		106
Alabama, &c. v. Burkett		296
v. Kidd	347, 531,	559
Albany, &c. v. Brownell		300
v. Lansing		299
Albee v. Ward		129, 213
Albert v. Howell		194
Albright v. Lapp		115
Alcorn v. Philadelphia		392
Alden v. N. Y., &c.		588
v. Pearson		552
Alder v. Keighly		70, 329
Alderman v. Chester		29
Aldrich v. Cheshire, &c.		299
Aldridge v. Great		322, 352
Alexander v. Card		116
v. Greene		549
v. Hancock		197
v. Kennedy		231
v. Macauley		132
v. Southey		53
Alger v. Mississippi, &c.		343
Allan v. Gripper		564
Allaire v. Whitney		83, 84
Alleghany, &c.		194, 197
Allen v. Archer		5
v. Bridgers		47
v. Brown		454
v. Carter		232
v. Craig		264, 267
v. Decatur		274
v. Doyle		169
v. Feland		145, 255
v. Harper		227

Ball v. Winchester	357, 379	Barnard v. Ward	180
Ballard v. Russell	503	Barnes v. Allen	510
v. Perry's	264	v. Barber	126
Ballentine v. North	314	v. Hurd	409, 502
Ballou v. Farnum	421, 567	v. Rogers	188
Baltimore v. Blocher	348	v. Taylor	55
v. Brady	578, 584	v. Thompson	194
v. Brannan	391	v. Willett	211
v. Dalrymple	66	Barnet v. Bass	147
v. Magruder	312	Barnett v. Reed	119
v. Schumacher	322, 532	Barney v. Dewey	73, 78
v. Skeels	584	v. Lowell	393
v. Smith	596	Barnhill v. Phillips	223
v. State	295, 343	Barr v. White	501
v. Thompson	353	Barratt v. Collins	238
v. Union	300	Barret v. Coburn	232
v. Woodruff	352	v. Gracie	205
v. Worthington	588	Barrett v. Copeland	146
Bancroft v. Boston	334	v. Malden, &c.	412
v. Sinclair	142	v. Singer	423
Bane v. Detrick	44	Barron v. Eldredge	555
Bangor, &c. v. Smith	2	v. Pettes	135
Bank, &c. v. Baldwin	190	Barrows v. Fassett	15, 445
v. Calder	403	Barry v. Fisher	47
v. Davis	440, 441	v. Lowell	390
v. Matson, &c.	128	v. McGrade	135
v. N. Y.	102	v. St. Louis	430
v. Parsons	126	Barter v. Wheeler	563, 571
v. Reese	70	Barth v. Clise	212
v. Rutland	392	Bartholomew v. Finnemore	525
v. State	440	Bartlett v. Baker	398
v. Talcott	74	v. Crozier	124, 222
v. Triplett	282	v. Hoyt	38
v. Waterman	131	Bartley v. Richtmyer	515, 516, 519
v. Wister	286	Barton v. Burton	227
Bankard v. Baltimore	336	v. Syracuse	392
Banker v. Caldwell	199	Bass v. Chicago, &c.	341, 352
Banks v. Farwell	21	Bassell v. Steuben	357
Banlec v. New York	563	Bassett v. Godschall	112
Bannon v. Baltimore	295, 355	v. Mitchell	12
Banta v. Reynolds	130	v. Porter	220
Baptist Society v. Fisher	11	Batchelder v. Warren	602
Barber v. Morgan	75, 77	Bates v. Dyer	122
Barclay v. Clyde	560	v. Marsh	227
Bard v. Yohn	248, 250, 418	v. Shraeder	96
Barfoot v. Reynolds	449	v. Willard	146
Bargate v. Shortridge	275	Batson v. Donovan	580
Barkeloo v. Randall	255	Batty v. Duxbury	357, 363, 369, 382
Barker v. Binninger	46	Batut v. Hartley	532
v. Braham	490	Baugh v. McDaniel	322
v. Coffin	597	Baulec v. New York	352
v. Green	131, 159	Baum v. Mullen	503
v. Metropolitan	296	Bauskett v. Holsonback	240
v. Midland, &c.	354	Baxendale v. Eastern, &c.	355
v. N. Y. &c.	597	v. Hart	575
Barley v. Walford	76	v. North, &c.	355
Barnard v. Bartlett	23	Baxter v. Bush	524
v. Cobbe	601	v. Second	336
v. Haworth	222	v. Spuyten	300

Baxter v. Taylor	610	Bernal v. Hovious	161
Bayless v. Orne	402	Bernecker v. Miller	231
Bayley v. Manchester	412	Berry v. Cooper	571
Beach v. Child	230	v. Fletcher	242, 267
Beal v. South	573-575	v. Kelly	155, 254
Bean v. Bean	271	v. Vantvies	69, 443
v. Green	10	Betts v. Farmers', &c.	551
v. Hubbard	174	Bevard v. Hoffman	102, 103, 120
Beaulieu v. Portland, &c.	459, 463	Bevin v. Linguard	267
Beaver v. Batte	198	Bewick v. Whitfield	88
Beck v. Evans	580	Beynon v. Garrat	143
Beckford v. Montague	131	Bickerstaff v. Doub	188, 189
Beckman v. McKary	27	Bicknell v. Hill	169
Beckwith v. Smith	210	v. Trickey	160
Bedell v. Sturta	205	Bidault v. Wales	81
Beeby v. Beeby	508	Bigelow v. Heaton	600
Beers v. Place	180	v. Huntley	612
Beisiegel v. N. Y.	353	v. Randolph	392
Belger v. Dinsmore	550	v. Rutland	374
Belknap v. Boston	328	v. Winsor	263
Bell v. Byerson	81	Bignold v. Waterhouse	576
v. Cummings	63	Billings v. Russell	127, 129
v. Day	442	v. Tucker	604
v. Josselyn	446	Billingsly v. Rankin	133
v. Lakin	477	Billington v. Strauss	203
v. Rinker	511, 517, 518	Bircher v. Parker	66
v. Thorpe	141	Bird v. Astcock	40
v. Twentyman	611	v. Lynn	248
Bellamy v. Marjoribanks	289	v. Randall	477
Bellefontaine, &c. v. Schruyhart	342	v. Relfe	96
Bellemire v. Bank, &c.	284	Birdseye v. Flint	505
Bellinger v. N. Y.	312	Birkett v. Willan	580
Bellows v. Allen	146	Bispham v. Patterson	109
v. Sackett	607	Bissel v. Drake	61, 67
v. Shannon	139	v. Kip	213
Bellune v. Wallace	615	Bissell v. Hopkins	70
Belshaw v. Marshall	129	v. N. Y., &c.	580
Benbow v. North Carolina	318	Bixby v. Harris	223
Bendetson v. French	535	v. Rowe	141
Benedict v. Howard	229	Bizzell v. Hardaway	194
v. Martin	433	Black v. Hersch	484
Benior v. Paquin	62	Blackburn v. Baker	237, 265
Benjamin v. Strempel	601	Blackstock v. New York, &c.	348
Bennet v. Bullock	226, 231	Blackwell v. Wiswell	431
v. Mellor	534	Blain v. Patterson	72
Bennett v. Bayes	446	Blair v. Alston	74
v. Brown	208, 209	v. Milwaukee	346
v. Dutton	587	Blaisdell v. Portland	362
v. Filyaw	548	Blake v. Coats	605
v. Gillette	523	v. Ferris	431, 439
v. Judson	75	v. Hatch	164
v. O'Brien	529	v. Jerome	15
v. Smith	510	v. Kimball	178
Benoist v. Sylvester	265	v. Lanyon	476
Benson v. Berry	180	v. Midland, &c.	329, 347
Benton v. Wood	192	v. St. Louis	381
Benzel v. Lynch	208, 213	v. Shaw	178, 182
Berkshire, &c. v. Proctor	534, 536	Blakely v. Ruddell	48
Berland v. O'Neal	187	Blakemore v. Lan, &c.	573

Blakenship v. Barry	52	Bowen v. Fenner	32
Blaker v. Anscombe	58	v. Matheson	261
Blassingame v. Graves	270	v. Parkhurst	145
Blewett v. Coleman	234	v. Sandborn	44
Bliss v. Deerfield	362, 363, 382	Bowles's Case	88
v. Schaub	446, 601	Bowlin v. Nye	574
Bliven v. Hudson, &c.	559, 567, 573	Bowling v. Arthur	224
Blivens v. Johnson	190	Bowman v. Boston	360
Blocker v. Whittenburg	567	v. Eaton	50
Blodgett v. Boston	359	v. Tallman	488
v. Syracuse	391	Bowyer v. Cook	7
Blood v. Sayre	114	Boyce v. California, &c.	588
v. Tyngsborough	371	Boyd v. Blaisdell	523
Bloomington v. Durell	558	v. Byrd	512
Blosser v. Harshbarger	452	Boyden v. Bank	285
Blossom v. Dodd	578	v. U. S.	437, 444
Blower v. Great	551	Boyle v. Roche	63
Bloxam v. Hubbard	239	Boynton v. Willard	7, 167
Bluehill, &c. v. Ellis	403	Brackett v. Bullard	614
Blumenthal v. Brainerd	316, 319, 436	v. Lubke	428, 436
Blunt v. McCormick	607	v. Winslow	264
Board, &c. v. Helm	171	Bracy v. Kibbe	516
v. Mighels	356	Bradford v. South Carolina, &c.	319
Bobe v. Frowner	505	Bradish v. Gee	495
Bodenham v. Bennett	581	Bradley v. Arnold	236
v. Hoskins	288	v. Buffalo	346
Bodley v. Reynolds	69	v. Chamberlain	139
Boice v. Hudson	328	v. Davis	4
Boies v. Hartford	527	v. Fisher	478
Bolton v. Cummings	212	v. New York, &c.	299
v. Miller	512	v. Wyndham	143
v. Sherman	69	Brady v. Lowell	357
Bolton Iron Co. v. King	613	Brailey v. Southborough	358
Bond v. Padelford	163	Brainerd v. Dunning	192
v. Ward	172	Branch v. Morrison	58
v. Willett	200	v. Roberts	402
Boner v. Merchants', &c.	558	Brand v. Schenectady, &c.	597
Bonnel v. Dunn	185-187	Brandon v. Scott	238
Bonnell v. Bowman	185	Bray v. Bates	31
Bonner v. Latham	227	Bredin v. Bredin	261
Boobier v. Boobier	237	Breeze v. Bange	51
Boorman v. American	580	Bretherton v. Wood	266
Boot v. Cooper	224	Brian v. Strait	200
Booth v. Charlton	514	Brickner v. Central	456
Boothe v. Estes	32, 49	v. New York	463
Bordentown, &c. v. Camden	341	Briddon v. Great, &c.	568
Bosley v. Shanner	36	Bridgett v. Coyney	116
Boston v. Greenbush	296	Briggs v. Dearborn	162
v. Moring	69	v. Mason	167
v. Old	300	v. New York, &c.	40
Boswell v. Hudson, &c.	580, 594	v. Wardell	112
Bosworth v. Sturtevant	268	Briggs, &c. v. North, &c.	28
Bottom v. Clarke	286	Brightman v. Eddy	228
Bottomley v. Harrison	66	Bringloe v. Goodson	88
Bottoms v. Mithvin	133	Brinley v. Allen	162
Bougher v. Schobey	478, 484	Brinsmead v. Harrison	263
Boughton v. Carter	312	Brintnall v. S. & W., &c.	320
Boulmare v. Craddock	172	Bristol, &c. v. Collins	562
Boulton v. Crowther	398	Brittain v. Kinnaird	116

Britton <i>v.</i> Aymar	527	Brown <i>v.</i> U. S.	217
<i>v.</i> Cole	142	<i>v.</i> Vandyke	402
<i>v.</i> Cummington	359, 363	<i>v.</i> Waterman	529
Brock <i>v.</i> Connecticut, &c.	296	<i>v.</i> Wheeler	242
<i>v.</i> Eastman	232	<i>v.</i> Wylie	122, 123
Brockway <i>v.</i> Lascale	587	Brownell <i>v.</i> McEwen	518
Brodie <i>v.</i> Rutledge	119	<i>v.</i> Manchester	163
Brokaw <i>v.</i> New Jersey	275	Browning <i>v.</i> Bancroft	83
Bromley <i>v.</i> Coxwell	451	<i>v.</i> Hanford	148, 167
<i>v.</i> Wallace	508	<i>v.</i> Skillman	9, 187, 261
Bronson <i>v.</i> Southbury	356	<i>v.</i> Springfield	357
<i>v.</i> Wiman	80, 82	Bruce <i>v.</i> Holden	146
Brooke <i>v.</i> Grand	321	<i>v.</i> Snow	212
<i>v.</i> Pickwick	581, 593	Brucker <i>v.</i> Fromont	414
Brookings <i>v.</i> Cunningham	117	Bruner <i>v.</i> Dyball	37
Brooklyn, &c. <i>v.</i> Brooklyn, &c.	304,	Brush <i>v.</i> Scribner	80
<i>v.</i> Coney, &c.	381	Bryan <i>v.</i> State	476
Brooks <i>v.</i> Ashburn	303	Bryant <i>v.</i> Biddeford	361, 364
<i>v.</i> Boston	243	<i>v.</i> Clifford	241
<i>v.</i> Hoyt	604	<i>v.</i> Rich	410
<i>v.</i> Lawrence	215	<i>v.</i> Simoneau	74
<i>v.</i> Olmstead	451	Brydges <i>v.</i> Walford	196
<i>v.</i> Petersham	408	Buck <i>v.</i> Goodrich	501
<i>v.</i> Somerville	372	Buckenham <i>v.</i> Francis	18
<i>v.</i> Stinson	381	Buckley <i>v.</i> Great	317
Brown <i>v.</i> Acerrington	609	Buckmaster <i>v.</i> Drake	195, 197
<i>v.</i> Ashborough	437	<i>v.</i> Mower	32
<i>v.</i> Beason	201, 203	<i>v.</i> Smith	71
<i>v.</i> Bissett	28	Buddenburg <i>v.</i> Benner	542
<i>v.</i> Brown	142	Buddington <i>v.</i> Shearer	268
<i>v.</i> Burrus	478	Buffalo, &c. <i>v.</i> Dudley	277
<i>v.</i> Castles	266	<i>v.</i> Erie	219
<i>v.</i> Cayuga, &c.	77	<i>v.</i> Holloway	452
<i>v.</i> Clayton	312	Buffandeau <i>v.</i> Edmondson	127
<i>v.</i> Clegg	455, 547	Buffit <i>v.</i> Troy, &c.	587
<i>v.</i> Combs	400	Bulkley <i>v.</i> New York, &c.	340, 342
<i>v.</i> Duplessis	232	Bullitt <i>v.</i> Clement	120
<i>v.</i> Eastern, &c.	303	Bulymore <i>v.</i> Cooper	210
<i>v.</i> Fifield	593	Bunnell <i>v.</i> Greathead	508
<i>v.</i> Fitz	500	Burci <i>v.</i> Red Bluff Hotel Co.	479
<i>v.</i> Gleed	499	Burditt <i>v.</i> Hunt	616
<i>v.</i> Graham	168	Burger <i>v.</i> Belsley	501
<i>v.</i> Hedges	235	Burgess <i>v.</i> Clements	542
<i>v.</i> Hitchcock	226	<i>v.</i> Gray	427
<i>v.</i> Howard	531	<i>v.</i> Great, &c.	344
<i>v.</i> Jefferson	445	Burley <i>v.</i> Bethune	120
<i>v.</i> Kelley	356	Burmeister <i>v.</i> Dewey	192
<i>v.</i> Lent	201	Burnap <i>v.</i> Marsh	491
<i>v.</i> Manter	444	Burnell <i>v.</i> N. Y.	592
<i>v.</i> Mason	6	Burnham <i>v.</i> Seaverns	523
<i>v.</i> Maxwell	125	<i>v.</i> Stevens	113
<i>v.</i> Milwaukee	466, 467	Burns <i>v.</i> Hill	524
<i>v.</i> Mott	346	Burnside <i>v.</i> Twitchell	51
<i>v.</i> New York	562	Buron <i>v.</i> Denman	411
<i>v.</i> Perkins	295, 302, 598	Burr <i>v.</i> Woodrow	17
<i>v.</i> Providence, &c.	18, 243	Burrell <i>v.</i> Burrell	234
<i>v.</i> Richmond	298	Burroughs <i>v.</i> Norwich	555
<i>v.</i> Smith	178, 186	Burt <i>v.</i> Thompson	199
	219	Burtis <i>v.</i> Buffalo	562

Burton <i>v.</i> Fulton	256	Campbell <i>v.</i> Arnold	609
<i>v.</i> Miller	65	<i>v.</i> Campbell	227
<i>v.</i> North, &c.	343	<i>v.</i> Cooper	476
<i>v.</i> Scherpf	13	<i>v.</i> Hillman	446
<i>v.</i> Sweaney	136	<i>v.</i> Johnson	172
<i>v.</i> Tannehill	615	<i>v.</i> Perkins	544
<i>v.</i> Wilkinson	173	<i>v.</i> Phelps	150, 152, 263
Bush <i>v.</i> Miller	531	<i>v.</i> Providence	418
<i>v.</i> Steinman	424, 435, 436	<i>v.</i> Reeves	452, 544
Bushe's Case	213	<i>v.</i> St. John	66
Bushel <i>v.</i> Miller	42	<i>v.</i> Swasey	150
Bushell's Case	111	<i>v.</i> Webb	126
Butler <i>v.</i> Collins	4	Canada <i>v.</i> Southwick	137, 178
<i>v.</i> Heane	584	Canandaigua, &c. <i>v.</i> Payne	313
<i>v.</i> Hicks	69	Candee <i>v.</i> Penn.	590
<i>v.</i> Kent	123	Cane <i>v.</i> Watson	266
<i>v.</i> Rews	238	Canfield <i>v.</i> Monger	62
<i>v.</i> Washburn	211, 212	Canham <i>v.</i> Barry	73
Butman <i>v.</i> Vermont, &c.	299	Canot <i>v.</i> Hughes	50
Butt <i>v.</i> Great Western, &c.	583	Cantrell <i>v.</i> Colwell	409
Butterfield <i>v.</i> Ashley	477	Cantrine <i>v.</i> Clark	124
<i>v.</i> Haskins	187	Card <i>v.</i> New York	345
Butterworth <i>v.</i> Brownlow	567	Cardinal <i>v.</i> Edwards	529
Buzzell <i>v.</i> Laconia	456, 460	Carew <i>v.</i> Rutherford	261
Byard <i>v.</i> Holms	75	Carey <i>v.</i> Bright	29, 54
Byram <i>v.</i> McGuire	411, 412	<i>v.</i> Tinsley	136
Byrne <i>v.</i> Stout	40	Cargill <i>v.</i> Webb	170
Byron <i>v.</i> N. Y., &c.	458	Carl <i>v.</i> Maillard	466
		Carle <i>v.</i> Bangor, &c.	463
		Carleton <i>v.</i> Haywood	503
		<i>v.</i> People	122
		Carli <i>v.</i> Stillwater	296
		Carlisle <i>v.</i> Garland	151
		<i>v.</i> Sheldon	371
		Carlton <i>v.</i> Davis	161
		Carman <i>v.</i> Steubenville, &c.	405
		Carman <i>et al.</i> <i>v.</i> The Mayor, &c.	414
		Carnes <i>v.</i> Nichols	526
		Carpenter <i>v.</i> Barber	3
		<i>v.</i> Central	300
		<i>v.</i> Hale	34
		<i>v.</i> Halsey	15
		<i>v.</i> Taylor	535
		Carpentier <i>v.</i> Willet	212
		Carr <i>v.</i> Clarke	512
		<i>v.</i> Clough	64
		<i>v.</i> Dodge	227
		<i>v.</i> Gale	47
		<i>v.</i> Georgia, &c.	297
		<i>v.</i> Lancashire	315
		Carraway <i>v.</i> Burbank	40
		Carroll <i>v.</i> Board, &c.	356
		<i>v.</i> Cone	285
		<i>v.</i> Hussey	190
		<i>v.</i> McCleary	27
		<i>v.</i> Minnesota	334, 471
		<i>v.</i> Mix	39
		<i>v.</i> N. Y. &c.	597
		Carruth <i>v.</i> Grassie	187

Carson v. Bassett	394	Chandler v. Spear	239
v. Western, &c.	354	Chandos (Duke of) v. Talbot	89
Carter v. Feland	69	Chapin v. Siger	29
v. Hobbs	534	v. Sullivan, &c.	299, 342
v. Kingman	33	Chapman v. Albany, &c.	300
v. Streator	70	v. Atlantic	352
Cartland v. Morrison	64	v. House	267
Cartwright v. Wilmerding	530	v. Kincaid	7
Caruthers v. Sprayberry	198	v. Lamb	46
Carver v. Creque	59	v. Morgan	8
Cary v. Cleveland, &c.	590	v. N. O.	552
v. Hotailing	79, 80, 81	v. New York, &c.	342
v. Webster	406	v. Thornburgh	164, 190
Case v. Dean	123	v. Van Toll	489
v. The Merchants', &c.	291	Chase v. Andrews	170
Case of the Phila., &c.	295	v. Blaisdell	36
Casey v. Suter	601	v. Ingalls	125
Cashill v. Wright	539	v. Keyes	215
Casky v. Haviland	141	v. New York, &c.	313
Cass v. Boston	317, 564	v. Plymouth	135
Cassard v. Hinman	440	v. Washburn	532
Castleman v. Griffin	73	Cheasley v. Barnes	142
Castner v. Symonds	146, 147	Cheek v. Wheatley	63
Caswell v. Boston	322, 338	Chegary v. Jenkins	115
Cate v. Cate	5, 15	Chenault v. Walker	197
v. Howard	198	Cheney v. Boston, &c.	325
Catlett v. Gilbert	192	Chesapeake v. Swain	288
Catteral v. Kenyon	504	Chester v. Dickerson	78
Caughey v. Smith	522	Chestnut v. Rutter	273
Cavillaud v. Yale	487	Chevalier v. Straham	546
Cawkwell v. Russell	396	Chevallier v. Patton	568
Cazeaux v. Mali	401	Chicago v. Ames	559
Centlivre v. Ryder	40, 541	v. Carpenter	288
Central, &c. v. Dixon	330	v. Cauffman	338, 340, 346
v. Hetfield	296, 298	v. Flagg	328
v. Hines	567	v. Gretzner	336
v. Lawrence	341	v. Harney	468, 470
v. Pearson	297	v. Harris	345
Chaffee v. Boston	337	v. Hazzard	587
v. Fort	285	v. Herring	328
Chaffin v. Crutcher	193	v. Johnson	370, 387
Chamberlain v. Clemence	30	v. Murphy	463
v. Enfield	363, 369, 383	v. North Western	456
v. Hazlewood	506	v. Parks	327
v. Masterson	542	v. Pondom	332
v. Milwaukee, &c.	324, 464	v. Reid	341
v. West	301	v. Robbins	380, 432
v. Weston	580	v. Roberts	326
Chamberlin v. Shaw	70	v. Sanford	296
Chambers v. Bedell	15	v. Scott	318, 532
v. Caulfield	508, 509	v. Shannon	348
v. Lewis	135	v. Smith	366
Champaign v. Patterson	361, 364, 369, 378	v. Stanford	288
v. Smith	181, 221	v. Starr	379
Champion v. Doughty	8	v. Stumps	303
Champney v. Smith	45	v. Swett	458
Chandler v. Broughton	412	v. Triplett	354
		v. Van Dressar	551
		v. Volk	408

Chicago, &c. v. Warren	317	Clark v. Whitaker	28, 30
v. Williams	322	Clarke v. Lyman	181
Chickering v. Fales	164	v. May	115
v. Robinson	112	v. Needles	554, 571
Chidsey v. Canton	380	v. Rochester, &c.	569
Childs v. Bank, &c.	274	Clawson v. The State	256
v. Dilworth	192	Clay v. Caperton	136
Chilton v. London, &c.	328	v. Sandefer	256
Chipman v. Bates	22, 23	Clayton v. Butterfield	543
v. Emeric	97	v. O'Conner	77
Chippendale v. Lancashire, &c.	315, 577	Cleaveland v. Grand	237
Chisholm v. Northern	587	Clemence v. Steere	91
Chorley v. Balcot	495	Clement v. Little	161
Chouteau v. Leech	545, 571, 576	v. Wafer	267, 503
v. Steamboat, &c.	528, 548, 549	Clerk v. Lockport	357
Chown v. Parrott	483	Cleveland v. Bartram	598
Christenson v. American	549, 580	v. Curran	583
Church v. Cherryfield	364	v. Pattison	456
v. Clark	195	v. Perkins	551
v. Wright	264	v. Prentice	296
Churchill v. Churchill	126	v. Sargent	557
Cincinnati v. Boal	545	v. Stackhouse	296
v. Cummins ville	303	Clingman v. Barrett	124, 134
v. McCool	319, 530	Clopton v. Cozart	82
v. Marcus	579	Closson v. Morrison	180
v. Pontius	583	Clowes v. Hawley	63
v. Smith	340	Cluley v. Lockhart	199
v. Spratt	562	Clussman v. Merkel	489
v. Stone	243, 424	Clute v. Wiggins	533
Citizens', &c. v. Howell	284	Clyde v. Graver	571
Clapp v. Clapp	508	Coats v. Chaplin	553
v. Hayward	210	v. Darby	156
v. Thomas	183, 184, 185	Cobb v. Cornegay	60
Clark v. Axford	221	v. Portland	393
v. Baird	78	v. Wallace	601
v. Bales	243, 267	Coburn v. Chamberlin	198
v. Bank of Wheeling	453	Cockerham v. Baker	143, 194
v. Barnwell	570	Codman v. Freeman	139
v. Barrington	375	Codrington v. Lloyd	490
v. The Boston	303	Coe v. Wise	217
v. Chamberlain	47	Coffey v. Wilkerson	34
v. Eighth, &c.	330, 333, 587	Coffin v. Anderson	68, 401
v. Fitch	513	v. Landis	472
v. Foxcroft	136, 143	v. Rich	383
v. Gary	142	Cogburn v. Spence	130, 157
v. Gilbert	32	Coggeshall v. Varnum	192
v. Hale	54	Coggs v. Barnard	545
v. Harlan	510	Coggs well v. Lexington	368
v. Lowell, &c.	600	Cohen v. Frost	596
v. Norton	219	Cohoon v. Speed	115
v. Pacific	566	Colby v. Sampson	210, 215
v. Peckham	275, 392	Cole v. Dugger	142
v. Pinkney	202, 203	v. Hindson	128
v. Rideout	30	v. Parker	171
v. Spicer	110	Colegrove v. N. Y., &c.	247
v. Union	599	Coleman v. N. Y., &c.	328, 410
v. Vermont, &c.	431	v. Riches	408, 442
		Coles v. Clarke	615, 616
		Collen v. Kelsey	503

Colley v. Morgan	213	Comstock v. Des Moines	341
Collier v. Lyons	63	Concanen v. Lethbridge	209
v. Swinney	549	Concord v. Greely	303
v. Valentine	572, 573	v. Gregg	441
Collins v. Boston, &c.	595, 596	Condict v. Grand	563
v. Dorchester	368	Condit v. Blackwell	455
v. Ferris	112	Coney v. Westbrook	371
v. Perkins	176	Congar v. Chicago	560
v. The Bristol	319	Congdon v. Norwich	367
Colquitt v. Howard	279	Conger v. Hudson, &c.	572
Coltraine v. McCain	115	Congreve v. Morgan	434
Columbus v. Arnold	470	Conkey v. Bond	455
v. Webb	459	Conklin v. Parker	141
Colyar v. Taylor	544	v. Thompson	524
Commercial, &c. v. Ten Eyck	402, 404	Conlin v. Charleston	335
v. Union, &c.	403	Connecticut, &c. v. Holton	302
v. Wilkins	137	Connelly v. Walker	171
v. Williams	186	Conner v. Allen	47
Commonwealth v. Belyard	507	v. Winton	528, 529
v. Canada	269	Connerville v. Wadleigh	82
v. Capp	300	Connolly v. Davidson	471
v. Carey	207	v. Warren	592
v. Connecticut	592	Connoss v. Meir	67
v. Cooley	207	Conrad v. Trustees, &c.	388
v. Curley	210	Converse v. Norwich	321
v. Dougherty	14	Conway v. American, &c.	526
v. Eagle	246	v. Campbell	195
v. Erie, &c.	382	v. Nolte	174
v. Hartford	300	Conwell v. Emrie	221
v. Haverhill	300	v. Smith	526, 530
v. Hicks	312	Cook v. Hartle	69
v. Holliston	359	v. Holt	601
v. Hurley	242	v. Hopper	155
v. Intoxicating		v. Metropolitan	335
Liquors	207	v. Miller	189
v. Irwin	207	v. Milwaukee	366, 367,
v. Jailer	207		369
v. Kennard	137, 174	v. New York, &c.	425
v. Kirby	111, 127,	v. The Champlain, &c.	93
	140	Cooke v. Birt	23
v. Lakeman	234	Cooks', &c. v. Gibson	2
v. Lightfoot	159, 191	Cooley v. Brainerd	346
v. McGahey	206	Coombs v. Bristol, &c.	552
v. Magee	141	v. Furrington	365, 371
v. Martin	207	v. Topsham	372
v. Mitchell	210, 212,	Coomes v. Houghton	410
	213	Coon v. The Syracuse, &c.	464,
v. Naylor	533		466
v. Prius	256	Cooper v. Berry	578
v. Reed	213	v. Chitty	26
v. Rigney	229	v. Hamilton	466
v. Rodes	124	v. Lampeter	281
v. Sheriff	213	v. Moore	123
v. Temple	303, 312	v. South	265
v. Tenney	34	v. Stephenson	485
v. Union, &c.	282	v. Taylor	8
v. Vandyke	172	v. Wandsworth	394
Compton v. Van Volkenburgh	598	v. Willomatt	32
		Coopwood v. Baldwin	481, 483

Copley v. Rose	136	Crocket v. Braty	43
Corbin v. American Mill	426, 430	Crocket v. Calvert	423
Corey v. Bath	384	Crockett v. Crockett	90, 91
Cornell v. Dakin	168	v. Lashbrook	11
Cornish v. Strutton	98	v. Latimer	150
Correas v. San Francisco	391	Croft v. Alison	411
Corrigan v. Union	410	v. Hicks	484
Coryton v. Lithebye	237	v. Rains	238
Coster v. Mayor	393	Crofts v. Waterhouse	589
Coterell v. Jones	496	Croghan v. State	511
Cott v. Lewiston	312	Cromwell v. Stephens	53
Couch v. Steele	457	Cronkhite v. Wells	423
Couillard v. Johnson	47	Crookshank v. Kellogg	2
Coulson v. Coulson	74	Cropper v. Coburn	271
County, &c. v. Gibson	357	Crosby v. Baker	135, 161,
v. Hosford	356		618
v. Steele	356	Cross v. Brown	170
Courtis v. Kanes	36	v. Phelps	137
Cousland v. Davis	36	v. Robinson	232
Courtney v. Carr	75	Crouch v. Great, &c.	319
Covington v. Bryant	387	v. London, &c.	546, 551,
v. Kinney	357		579
Cox v. Dove	13	Crow v. Mechanics', &c.	282
v. Easeley	601	Crowder v. Goodwin	131
v. Hall	253	Crowell v. Sonoma, &c.	356
v. Leech	481, 488	Crowley v. Panama, &c.	347
v. O'Riley	530	Crowther v. Ramsbottom	140
v. Sullivan	479, 484	Crozier v. Boston	596
Coxe v. Heisley	586	v. Cundey	129
Coxon v. Great, &c.	562	Crump v. U. S. Mining Co.	278
Coy v. Utica, &c.	341	Cudlip v. Rundall	610
Coykendall v. Eaton	526, 534,	Cumberland's (Countess of) Case	89
	538	Cumins v. Wood	527
Coyle v. Western	317	Cummins v. Spruance	374
Craig v. McHenry	55	Cunningham v. Dyer	266
v. Rochester	296	v. Pitzer	36
v. Ward	75	v. Smith	73
Cram v. Thissell	245	Currie v. Worthy	211
Cramer v. Wright	474	Currier v. Lowell	382
Crandall v. James	219	v. Marietta	300
Crane v. Mason	14	Curry v. Pringle	155, 156
Crary v. Campbell	231	Curtis v. Avon	596
Cratty v. Bangor	378	v. Detroit	330
Crawford v. Bank	142	v. Fay	122, 150
v. Clark	561	v. Galvin	604
v. French	264	v. Hubbard	18
v. Morris	268	Curtiss v. Hoyt	612
v. Newell	160	v. Rochester	330, 352
v. Village	390	Cushing v. Adams	500
Creach v. McRae	58	v. Dill	417
Creigh v. Blood	88	v. Kenfield	604
Crewe v. Crewe	508	Cuthbertson v. Parsons	438
Crisman v. Masters	341	Cutter v. Currier	232
Cristie v. Sawyer	487	v. Fanning	38, 63,
Critchfield v. Humbert	226		70
Crocker v. Carson	234	Cutting v. Grand	558
v. Gullifer	32, 33	v. Seabury	521
v. New London, &c.	325,		
	327		

D.		Dawson v. The Real, &c.	286
		Day v. Crawford	453
		v. Owen	551, 589
Dacy v. New York, &c.	286	Dayton v. Lynes	179, 190
D'Aguilar v. D'Aguilar	508	v. Pease	386, 388
Dain v. Wycoff	513	Deal v. Bogue	157
Dale v. Birch	194	v. Harris	113
v. Gunter	357	Dealy v. Lance	39
v. Hall	567	Dean v. Comstock	14
v. Radcliffe	208	v. Hogg	601
Dalston v. Janson	575	v. Peel	513
Dalyell v. Tyrer	425	v. Sullivan, &c.	298
Dame v. Dame	58	v. Vaccaro	557
Dameron v. Williams	157	Deans v. Jones	93
Damon v. Bryant	126	Dearborn v. Boston, &c.	298
v. Moore	511	v. Dearborn	482
Damont v. New Orleans, &c.	334	De Camp v. Mississippi	408
Dana v. Lull	146, 183, 388	Decatur v. Fisher	369
Danehy v. Sillaman	578	Decker v. Bryant	126
Danforth v. Dart	81	v. Livingston	499
Daniel v. Daniel	503	v. Mathews	61
Daniels v. Brown	606	Deering v. Austin	43
v. Hayward	184	De Feriet v. Bank	285
v. Pond	97	De Forrest v. Wright	431, 438
v. Saybrook	375	Degg v. Midland, &c.	464, 467
Dansey v. Richardson	537	Dejarnatte v. Allen	95
Danville, &c. v. Stewart	245	Delano v. Curtis	448
Darden v. Cowper	226	Delany v. Hill	70
Darling v. Boston	321	v. Root	65
v. Dodge	160	Delegal v. Naylor	63
Dart v. Lowe	528	Delhi v. Youmans	312
Dater v. The Troy, &c.	274	Delmonico v. New York	388
Daubney v. Cooper	117	Delvalle v. Plomer	146
Davany v. Koon	131	Dement v. Scott	529
Davenport v. Ruckman	357, 379, 381	Demott v. Laraway	315
Davidson v. Donadi	47	Dennett v. Dennett	99
v. Graham	576, 580	Dennis v. Barber	69
v. Gunsolly	70	v. Clarke	522
v. Waldron	190, 199	v. Kennedy	401
Davies v. Williams	513	Denny v. Brunson	99
Davis v. Bangor	364	v. Correll	269
v. Bank, &c.	281	v. Gilman	74
v. Burlington	345	v. Manhattan Co.	444
v. Capper	113	v. N. Y., &c.	573
v. Davis	68, 190	v. Warren	161
v. Dudley	365, 375	Denton v. Great Northern, &c.	329
v. Gilliam	90, 95	Deposit, &c. v. Ayscough	277
v. James	553	De Puy v. Strong	237
v. Lamoille, &c.	358	Derby v. Philadelphia, &c.	587
v. Michigan, &c.	590, 592, 595	Dermont v. Detroit	391
v. Oswell	69	Derrickson v. Cady	481
v. Patty	162	Derwort v. Loomer	587
v. Robinson	205	Despan v. Olney	443
v. Russell	296	Detroit v. Blackeby	389
v. Taylor	28, 504	v. Farmers', &c.	321
v. Willan	584	v. Steinburg	326
Davlin v. Stone	174	Devereux v. Barclay	38
Dawson v. Chamney	534	Dewey v. Chicago	346
v. Cholmeley	538	v. Detroit	370

Dewey v. Field	167	Dover School v. McFarlan	11
v. Sir A. Baynton	137	Dowd v. Wadsworth	52
Dexter v. Syracuse	591	Dowling v. Clark	185
Deyo v. New York	334	v. Todd	521
Dezell v. Odell	138	Downer v. Lent	102
Dibble v. Briggs	198	v. Rowell	35
v. Brown	591	Downing v. Herrick	111
Dickinson v. Billings	219	Downshire (Marquis of) v. Lady	
v. Goodspeed	605	Sandys	88
v. Jones	94	Doyle v. Kiser	596
v. Winchester	546	v. True	171
Dickson v. Coward	208	Dozier v. Gregory	95
Dietrich v. Murdock	297	Drake v. Barrymore	269
Dietus v. Fuss	37, 38, 49, 50	v. Chester	215
Dill v. Railway Co.	589	v. Lowell	369
Dillenback v. Jerome	70	v. Shorter	40
Directors, &c. v. Railroad	299	Draper v. State	199
Disbrow v. Tenbroeck	33	Draughon v. Quillen	455
Dixon v. Watkins	136	Dreher v. Fitchburg	371, 376
Doane v. Badger	234	Drennan v. People	206
v. Baker	212	Drewe v. Coulton	218
Dobbs v. Justices, &c.	136	Dreyer v. Ming	243
Dodd v. Watson	227	Drinkwater v. Quinell	579
Dodge v. County Commissioners	298	Driscoll v. Nichols	554
Doe v. Filliter	496	v. Place	44
Doggett v. Cook	113	Drummond v. Humphreys	472
Doillie v. Joiliffe	142	Druse v. Wheeler	123
Dole v. Olmstead	530	Dryfus v. Dridg	193
Donahoe v. Richards	124, 523	Dubois v. Allen	477
v. Shed	129	v. Beaver	28
Donaldson v. Boston	370	v. Harcourt	139
Donham v. Wild	419	Duckworth v. Johnson	523
Donnell v. Thompson	61	Dudgeon v. Teass	529
Donohue v. Henry	27, 49, 63	Dudley v. Hawley	447, 617
Donovan v. Jones	207	v. Sawyer	28
Dooley v. Root	151	Duff v. Budd	580
Doolittle v. McCullough	70	Duffy v. N. Y., &c.	341
Doorman v. Jenkins	527, 533	Dufolt v. Gorman	600
Doran v. East	598	Dufour v. Mephram	531
Dorchester, &c. v. New England,		Dufresnee v. Hutchinson	452
&c.	284	Duguid v. Edwards	203
Dorlon v. Brooklyn	439	Duke v. Rome	389
Dorman v. Jacksonville	388	v. Vincent	153
v. Kane	46, 129, 166,	Dumont v. Dufore	233
v. Long	175	Duncan v. Fisher	40
Dorn v. Barker	12	v. Matney	177
Dorr v. Mickley	219	v. S. C., &c.	475
v. N. J., &c.	575, 578	v. Sylvester	231
Doswell v. Impey	109, 114	Dunkle v. Wiles	12
Doty v. Gorham	155	Dunklee v. Locke	155
Dougherty v. Posegate	527	Dung v. Parker	86
v. Wells	408	Dunkin v. McKee	199
Douglas v. Whiting	147	Dunlap v. Glidden	263
Douglass v. Baker	158	v. International	592
v. Mitchell	199	Dunlop v. Lambert	553
v. Stephens	409	Dunson v. New York	322, 573
v. Whiting	206	Duperrier v. Dautrive	475
v. Wiggins	92	Dupree v. Dupree	97
		Durand v. Hollins	449

Durant v. Eaton	219	Eichar v. Kistler	518
v. Palmer	380	Ela v. Smith	101, 109, 223
Durden v. Barnett	522	Eldridge v. Adams	601
Durell v. Hayward	15	v. Stacy	23
Durgin v. Gage	46, 52	Eliot v. Allen	267
v. Leighton	10, 270	Elizabethtown v. Helm	296
Durkin v. Hodgen	527	Elkin v. The People	256
v. Troy	371	Elkins v. Boston, &c.	474
Durst v. Barton	440	Elliot v. Concord	381
Dustin v. Cowdry	605	Elliott v. Pray	609
Dwight v. County, &c.	238	v. Shepherd	9
Dwinell v. Larrabee	228	Ellis v. Howard	253
Dwinnels v. Boynton	22	v. Sheffield, &c.	434
v. Parsons	225	v. Yarborough	208
Dyer v. Grand	602	Ellison v. Wilson	129
Dyne v. Hoover	125	Elmore v. Naugatuck, &c.	319
Dynen v. Leach	461	Elsee v. Smith	155
		Elton v. Larkins	73
E.		Ely v. Hair	183
Eadie v. Shinmon	506	v. Rochester	391
Eager v. Taylor	187	Emanuel v. Cocke	187
Eakin v. Brown	608	Emm v. Johnson	552
Eames v. Boston	344	Emmerson v. Annison	3
v. Prentice	2	Empire v. Wamsutta	571
v. Salem	344	Enos v. Hamilton	408
v. Worcester	346	Enright v. San Francisco	344, 346
Earl v. Camp	138	Epps v. Hinds	533, 534, 539
Earle v. Hall	432, 435, 614	Erie City v. Schwingle	358, 378
v. Holderness	72	Ernst v. Hudson	336
Earl of Ferrars v. Robins	455	Eshbach v. Eshbach	506
Earl of Lonsdale's Case	397	Eshleman v. Lewis	478
Easley v. Dye	138	Estabrook v. Hapgood	146
East v. Hottenstine	29	Estabrooks v. Peterborough	313
v. Lythgoe	591	Estes v. Boothe	32
v. Nelson	330, 551	Esty v. Baker	6, 14
v. Schollenberger	296	Etriche v. Officer, &c.	46
Easter v. The Little, &c.	341	Etter v. Bailey	39
Eastern, &c. v. Broom	274, 276, 348	Evans v. Burlington	346
East India Co. v. Pullen	563	v. Collins	493
Eastman v. Grant	265	v. Governor	196, 200
East Tennessee, &c. v. Whittle	547	v. Kymer	63
Eaton v. Boston	338	v. Manero	159
v. European	296, 381, 437	v. Soule	586
v. Hill	523, 524	v. Walton	520
Echols v. Dodd	413	Evansville, &c. v. Baum	409
Eddy v. Howard	155, 253	v. Ross	343
Edelman v. Yeakel	4	v. Young	584
Eden v. Lexington, &c.	345	Everett v. Neff	609
Edgar v. Caldwell	236	Ewart v. Kerr	574
Edge v. Pemberton	89	v. Stark	543
Edgecombe v. Rodd	118	Ewer v. Lovell	230
Edgerly v. Emerson	67	Ewing v. Blount	63
Edgerton v. N. Y., &c.	322, 597	Express v. Kountze	584
Edmonds v. Buel	147	Exum v. Brister	411
Edwards v. Dickenson	224		
v. Lord	587	F.	
v. Union Bank	274	Fahnestock v. Bailey	474
v. White	52, 573	Fail v. McArthur	34

Fairchild v. California, &c.	588	Finnie v. Glasgow, &c.	355
v. Chastelleux	498	Fiquet v. Allison	228
Fairhurst v. Liverpool, &c.	505	First v. Marietta	323
Fairis v. State	137	First Baptist, &c. v. Schenectady,	
Fairmount v. Stutlev	324	&c.	275
Farish v. Reigle	588, 589	Fish v. Chapman	544, 568, 578, 579,
Farmers', &c. v. Butchers'	442		583
v. Champlain, &c.	548,	v. Dodge	445
566, 575, 585		v. Ferris	33
v. King	287	v. Kelly	480
Farmington v. Somersworth	141	Fishback v. Brown	446
Farnham v. Camden	580, 584	Fisher v. Boston	389
Farnum v. Concord	371	v. Clisbee	598
Farrant v. First	301	v. Deans	120
Farrar v. Alston	73	v. Farmers'	346
v. Barnes	210	v. Hood	519
v. Beswick	241	v. Mellen	75
v. Chauffetete	49	v. Morris	11
v. Greene	371	v. Prince	72
v. Wingate	134	Fitch v. Newberry	600
Farrelly v. Cincinnati	389	Fitz v. Boston	365
Farrington v. Payne	28	Fitzpatrick v. New Albany, &c.	470
v. Sinclair	139	Fitzsimmons v. Joslin	411
Fawcett v. York, &c.	341	v. Southern	549
Fay v. Davidson	407	Flagg v. Flagg	25
v. Munson	161	Flanagan v. Hoyt	150
v. Steamer, &c.	550	v. Jerome	160
v. Stravon	283	Flanders v. Colby	615
Featherstonehaugh v. Johnston	38	v. Cross	221
Felch v. Allen	466	Fleming v. Culbert	484
Felkner v. Scarlet	516, 519	v. Mills	572, 590
Fellows v. Commissioners	442	Fletcher v. Barnet	374, 375
Feltham v. England	465	v. Boston, &c.	350
Fenlason v. Rackliff	58	v. Cole	161, 164
Fenner v. Buffalo	557, 564	v. Randall	517, 520
Fennings v. Lord Grenville	227	Flewster v. Royle	223
Fenno v. English	487	Flint v. Gloucester, &c.	421
Ferguson v. Carrington	80	v. Jones	74
v. Christabel	53	Florence v. Hopkins	231
v. Clifford	56	Floyd & Barker's Case	106
v. Tucker	509	Flynn v. San Francisco	313
Fergusons v. Terry	408	Fockler v. Martin	180
Ferrell v. Boykin	476	Fogarty v. Finlay	224
Ferris v. Union	597	Fogerty v. Jordan	485
Fettritch v. Dickenson	302	Fogg v. Griffin	440
Fiedler v. Maxwell	224	v. Nahant	372
Field v. Brackett	529	Foley v. Peterborough	508
Fiero v. Betts	236	Folsom v. Carli	146, 148
Fifield v. Fifield	137	v. Manchester	50
v. Railroad	459	Foltz v. Stevens	168
v. Wooster	162	Foot v. Bronson	312
Filbert v. Hoff	231	v. Dickinson	95
Files v. Magoun	610	Foote v. Colvin	237
Final v. Backus	64	Forbes v. Davis	555, 590
Finch v. Blount	69	v. Marsh	253
v. Clarke	39	v. Parker	617
Finn v. Clark	559	Forbush v. Lombard	10
v. Commonwealth	129	Ford v. Godbold	133
v. Western	557, 560	v. Mitchell	556

Ford v. Williams	483, 490, 491	Fuller v. Naugatuck, &c.	500, 546, 547, 587
Forsyth v. Hooper	423	v. Tabor	29
Fortune v. Harris	529	v. Wilson	442
Forward v. Pittard	567, 571	Fulton, &c. v. New York, &c.	286
Foshay v. Ferguson	36	Funk v. Hough	141
v. Glen	363	Furlong v. Bartlett	5
Foss v. Stewart	174	Furman v. Applegate	511, 517
Foster v. Crabb	227	v. Christie	197
v. Dryfus	141	Furniss v. Hudson, &c.	298
v. Kelsey	18	Furr v. Moss	115
v. Perley	150	Fuzier v. Sneath	74
v. The Essex, &c.	281, 286		
Fouldes v. Willoughby	27		
Fowler v. Dorlon	539, 542	G.	
v. Gilman	69, 70	Gage v. Epperson	36
v. Glastenbury	374	Gahagan v. Boston, &c.	300
Fox v. Jackson	411	Gaines v. Briggs	447, 614
v. Northern Liberties	411	Gainey v. Parkman	262
v. Sackett	374	Gale v. Gale	74
v. Sandford	469	Galena, &c. v. Appleby	353
v. Stevens	511, 518, 519	v. Crawford	343
v. Webster	75	v. Griffin	342
Foy v. Troy	319, 563	v. Kupfe	288
Francis v. Wood	216	v. Rae	441, 551, 599
Frankford v. Philadelphia	296, 351	v. Yarwood	587, 596
Franklin v. Jenkins	402	Galladge v. Howard	527
v. Small	165	Gallarati v. Orser	210
v. South Eastern	522	Galloway v. Pitman	270
Frantz v. Lenhart	243	Gambert v. Hart	480
Frazier v. Penn. R.R.	469	Gamble v. Reynolds	186
Freeman v. Baker	74	Gandy v. Chicago	313
v. Birch	553	Gardner v. Adams	64
v. Blewitt	142	v. Campbell	175
v. Newton	581	v. Heartt	428, 616
v. Scurlock	245	v. Hosmer	146, 154
v. Smyth	187	v. Smith	347
Freer v. Cameron	421	Garnett v. Ferrand	102, 117
Freethy v. Freethy	506	v. Willan	578, 583
Frellsen v. Anderson	129	Garrard v. Pittsburgh, &c.	245
French v. Allen	148	Garraty v. Duffy	2
v. Edwards	193	Garrison v. Burden	506
v. Fuller	402, 610	Garvey v. Camden	509
v. Reed	528	Garvin v. Luttrell	56
v. Snyder	190	Gass v. Coblens	408
v. Willet	127	v. New York	321
Friend v. Hamill	218	Gassett v. Sargent	167, 175
v. Woods	568	Gates v. Miles	409
Frink v. Potter	597	Gay v. Edwards	147
Frisbee v. Langworthy	136	v. Peacock	74
Frost v. Grand	339	Gazynski v. Colburn	502
Frothingham v. McKusick	614	Gearhart v. Smallwood	265
Fryer v. McRae	56	Geddes v. Pennington	81
Fulgham v. State	506	Gellatly v. Lowery	37
Fullam v. Cummings	60	Gelston v. Hoyt	224
Fuller v. Bradley	545	Gentry v. Madden	31, 47
v. Coates	539	George v. Fisk	603
v. Chamberlain	268	v. Van Horn	517
v. Holden	146		

George's Creek, &c. v. Detmold	99	Godefroy v. Dalton	480
Geortner v. The Trustees, &c.	271	v. Jay	481
Gerrish v. Cummings	267	Goetchens v. Matthewson	218
v. Edson	208	Goff v. Great	275, 347
Gerry v. Gerry	499	Golden v. Manning	557
Gibbon v. Paynton	579, 580	Goldey v. Pennsylvania, &c.	569, 580
Gibbs v. Chase	5	Golding v. Hall	264
Gibson v. Colt	441	Goldsmith v. Stetson	176
v. Gibbs	184	Goldthwait v. East, &c.	357
v. Hatchett	532	Golightly v. Reynolds	27
v. Pacific	456	Gonzales v. New York	337
Gilbart v. Dale	552	Goode v. Rawlins	193
Gilbert v. Beach	432, 433	Goodfellow v. Boston	332
v. Crandall	168	Goodhue v. Dix	415
v. Kennedy	17, 603	Goodloe v. Godley	284
Gilchrist v. Bale	509	Goodman v. Kennell	416
v. McLaughlin	11	v. Walker	482
Gile v. Libby	533, 540	Goodnough v. Oshkosh	369
Gilkinson v. Steamboat	557	Goodnow v. Willard	143, 165
Gill v. Fauntleroy	231, 233	Goodrich v. Church	181
v. Manchester	340, 570	v. Starr	143
v. Middleton	528	v. Yale	9
v. Miner	211	Goodspeed v. The East Haddam, &c.	274
v. Stebbins	209	Goodwin v. Baltimore	557, 567
Gillenwater v. Madison, &c.	330, 331	v. Scannell	531
Gillet v. Mead	518	v. Thompson	521
Gillett v. Ellis	568	Googins v. Gilmore	615
v. Fairchild	64	Goold v. Chapin	562
v. Western, &c.	301	Gordon v. Farrar	109
Gilman v. Deerfield	372	v. Gordon	506
v. Eastern	469	v. Harper	612
v. Emery	14	v. Jenney	161, 180
v. Hill	28	v. Railroad	332, 333
Gilshannon v. Stony Brook, &c.	464, 466	v. Ward	575
Gilson v. Gwinn	599	Gore v. Norwich	596
v. Madden	557	Gorman v. Pacific, &c.	295, 343
Ginochio v. Figari	204	v. Wheeler	450
Gisbourn v. Hurst	544	Gorton v. Erie	353
Givens v. McCalmont	89	Gosline v. Place	205
Glasco v. New York, &c.	590, 591, 594	Gotloff v. Henry	267
Glasgow v. Rowse	220	Goulding v. Davidson	503
Glavecke v. Tijirina	102	Gourdier v. Cormack	430, 603
Gleason v. Edmunds	269	Gourley v. Hanks	123
v. Owen	62	Gove v. Mastin	220
Glen v. Cuttle	484	Governor v. Matlock	215
Glenn v. Charlotte	317	v. Powell	190
v. Garrison	27, 67	Gowdy v. Lyon	572
Glezen v. Rood	208, 209	Grady v. Newby	199
Glidden v. Reading	373	Gragg v. Hull	172
Glover v. Horton	254	Graham v. Columbus	296, 300
v. North, &c.	295	v. Smith	517
v. Whittenhall	149	Grand, &c. v. County, &c.	296
Gock v. Keneda	264	v. Edwards	59
Godbold v. Bank, &c.	404	Granger v. George	28
Goddard v. Austin	182	v. Pulaski	357
v. Grand	410	Grant v. Newton	591, 592
v. Hapgood	183	v. Norway	408, 442
		Grassmeyer v. Beeson	238

Graves v. Hartford	560	Griffiths v. Gidlow	461, 463
v. Moses	530	v. Teetgen	513
v. Shattuck	364	Grigsby v. Chappell	546
Gray v. Brooklyn	357	Griswold v. Chandler	128, 190
v. Durland	516	v. Haven	440, 442
v. First	301	Groenvelt (or Grenville) v. Burn-	
v. Gillilan	477	well (or Burwell)	107
v. Hubble	430	Groff v. Cincinnati	332
v. Jackson	322	Gross v. Graves	203
v. Kimball	125	Grosvenor v. New York	554
v. Palmer	75	Grove v. Hodges	73
Graydon v. Stone	194	Grylls v. Davies	443
Great, &c. v. Crouch	560	Guerry v. Keston	406
v. Geddis	338	Guille v. Swan	244, 248
v. Goodman	306	Guillory v. Deville	185
v. Hanks	346	Gulliver v. Adams', &c.	549, 550
v. Harrison	330, 587	Gumberts v. Adams	123
v. Hawkins	551	Gump v. Showatter	600
v. Haworth	352	Gunn v. Davis	201
v. Northland	342	Gunning v. Gunning	91
v. Rimel	555, 566	Gunter v. Astor	476
Greaton v. Pike	185	v. Clepton	132
Greber v. Kleckner	612	Guntton v. Nurse	57
Green v. Birchard	445	Guptail v. Teft	129, 222
v. Clark	27, 553	Gurney v. Kenny	504
v. Elgie	109, 490	Gwathney v. Little, &c.	426
v. Farmer	46	Gwinther v. Gerding	73
v. Ferguson	144		
v. Gosden	81	H.	
v. Hackley	171	Haack v. Fearing	423
v. Jones	190	Haak v. Breidenbach	9
v. Keen	100	Haas v. Damon	29, 450
v. Lowell	194	Hackett v. Green	190
v. New York	322	Hadley v. Upshaw	539
v. Portland	383	Hafford, &c. v. Adams, &c.	283
v. Sperrey	33	Hager v. Danforth	20
Greene v. Cole	87	Haines v. East	458
Greenfield, &c. v. Leavitt	69, 574	Hair v. Little	242
Greening v. Wilkinson	69, 70	v. Melvin	500
Greenleaf v. Moody	451	Haldeman v. Martin	260
Greenwald v. Metcalf	34	Hale v. Ames	157
Greenwood v. Greenwood	512, 513	v. Barrett	597
v. Wilton, &c.	303	v. Huntley	184
Greer v. Powell	176	v. Rawallie	527
Gregory v. Adams	363	Halford v. Tetherow	231
v. Brooks	120, 131	Hall v. Boston	559
v. Brown	120	v. Burgess	30, 69
v. Cotterell	152, 267	v. Chapman	30
v. Duke of Brunswick	247	v. Crocker	145
v. Hill	25	v. Eaton	258
v. Piper	417	v. Goodson	71
Greves v. Louisiana	285	v. Hollander	521
Griel v. Hunter	177	v. Johnson	466
Grier v. Sampson	377	v. Manchester	369
Griffin v. Alsop	53	v. Munruek	201
v. Ganaway	191	v. Pike	535
v. Isbell	140	v. Renfro	546, 567, 573
v. Rising	219		
Griffith v. Cane	546		

Hall v. Robinson	37, 64	Harris v. Northern, &c.	560
v. Smith	413, 430, 437	v. Packwood	576
v. Unity	361	v. Saunders	30
v. Warner	407	v. Schultz	271
Hallet v. Novion	69	Harrison v. Central	349, 458
Halloran v. N. Y., &c.	340	v. Great	394
Hallower v. Henley	456	v. Harrison	14, 506
Halsey v. Matthews	7	v. Harwood	192
Halsted v. Brice	154	v. London	594
Halty v. Markel	530	v. Roy	545
Halyard v. Dechelman	531	Hart v. Aldridge	476
Hamden v. New Haven, &c.	381	v. Baxendale	578
v. Rice	90, 94	v. Brooklyn	390
Hamilton v. Boston	379	v. Crow	502
v. Ely	99	v. Girard	455
v. Goding	135	v. Rensselaer, &c.	590
v. Lomax	512	v. Stevenson	215, 216
v. McGee	264	v. Skinner	33
v. Turnpike	274	v. Tallmadge	74
v. Vail	186	v. Western	352
v. Ward	196	Harter v. Morris	480
Hamlin v. Dingman	122	Hartford v. Jones	66
v. Great Northern, &c.	329	Hartleib v. McLane	166
Hamma v. Russ	17	Hartley v. Moxham	4
Hammer v. Pierce	521	Hartshorn v. Ives	166
Hammett v. Blount	238	Harvey v. Epes	35
Hammond v. Morrell	238	v. Harvey	94
v. The People	128	v. Lackawanna, &c.	296
Hamond v. Howel	105, 111	v. Rose	598
Hampton v. Brown	138	v. Skipwith	529
Hamsher v. Kline	478	Harwood v. Lowell	499
Handley v. Call	261	Haskell v. Pennsylvania	387
Han long v. Barnes	554	v. Sumner	185
Handon v. London	574	Haslam v. Adams, &c.	545, 560
Hanley v. Harlam	354, 587	Haslegrave v. Thompson	66
Hanna v. Flint	52	Hassell v. Latham	145
Hannay v. Boehner	205	v. Southern, &c.	190
Hannibal v. Kenney	346	Hastings v. Halleck	483
v. Swift	322, 323, 545,	v. Perry	614
	593	Hasty v. Wheeler	92
Hanover v. Coyle	337, 348	Hatch v. Vermont	295, 312
Hanvey v. Rochester	390	Hatchell v. Kimbrough	606
Harden v. Ford	453	Hatcher v. Hampton	100
Harder v. Harder	97	Hatheway v. Jones	205
Harding v. Harding	508	Hathorn v. Calef	142
Hardison v. Jordan	120	v. Ely	564
Hardrop v. Gallagher	445, 603	Haughton v. Benbury	70
Hardy v. Reed	601	Havely v. Lowry	200
Hare v. Pearson	43	Havens v. Erie	336
Harger v. McMains	69	v. Hartford	408, 597
Harker v. Dement	28, 70	Hawcroft v. Great Northern	329
Harman v. Tappenden	401	Hawkins v. Appleby	272
Harper v. Erie	335	v. Bennett	184
v. Indianapolis	468	v. Great	551
Harpur v. Luffkin	515	v. Hoffman	575
Harrington v. Ward	123	v. Pearce	185
Harris v. Baker	430	v. Phythian	249
v. C. & W. Railway	355	Hawyer v. Seldenridge	122, 123
v. Murray	135	Hayden v. Smithville, &c.	460

Hayes v. Cincinnati	296	Hicks v. Cleveland	64
Haynes v. Thomas	17	v. Dorn	125
Haynie v. Baylor	545	v. Downing	610
Hays v. Askew	2	Hicky v. Boston	334
v. Paul	548	Higbee v. Camden	7, 301
Hayward v. Seaward	70	Higby v. Williams	252
Haywood v. Justices	357	Higdon v. Conway	126
Hazelrigg v. Brenton	484	Higgins v. Watervliet	328, 410
Hazlett v. Gill	201	Higginson v. Martin	131
Head v. Goodwin	48, 271	v. York	446
Headley v. Good	489	High v. Wilson	136
Heald v. Carey	29, 41	Hihn v. Peck	226
Hearn v. Parker	132	Hildreth v. Brigham	203
v. The London, &c.	315	Hill v. Covell	50
Heath v. Hubbard	227, 239	v. Hinton	141, 145
v. Westervelt	137	v. Morey	13
Hedges v. Hudson	319	v. Wiggin	236
Heermance v. James	509	v. Wilson	511
v. Vernoy	15	Hillebrant v. Brewer	69
Heffernan v. Benkard	424	Hilliard v. Goold	325, 327
Hegeman v. Western, &c.	331, 589	v. Richardson	432, 435
Heimer v. Wilcox	2	v. Wilmington, &c.	557
Heitzman v. Divil	249	Hills v. Farrington	619
Helsby v. Mears	546	Hinchman v. Paterson	296
Hemenway v. Bassett	616	Hinckley v. Baxter	58
Heminway v. Saxton	498	v. Lewis	59
Hemmenway v. Wheeler	160	Hindle v. Blades	209
Hemmings v. Smith	507	Hinds v. Jones	506
Hemphill v. Boston	360	Hiner v. Kichter	75
Hendrick v. Whittemore	115	Hines v. Perkins	453
Hendrix v. Trapp	13	v. Trantham	238
Henegar v. Spangler	204	Hirsch v. Quaker	564
Henley v. Mayor, &c.	124, 394	Hitchcock v. Baker	22, 203, 212
Hennessey v. White	502	Hoard v. Peck	499
Henry v. Lowell	214	Hobart v. Milwaukee	296, 303
v. Marvin	442	v. Plymouth	360
v. Rich	194	Hobbit v. London, &c.	429
v. Sennett	267	Hobson v. Woolfolk	527
v. Tilson	141	Hoby v. Built	483
Henshaw v. Noble	444	Hogdon v. Shannon	231
Herne v. Bembow	93	Hodge v. Bennington	263, 356
Herring v. Hoppock	243, 254	Hodges v. Callaghan	205
Herron v. Hughes	40, 256	v. Holderly	412
Hersfield v. Adams	549	v. Raymond	11
Hersom's Case	110	v. Windham	508
Hess v. Johnson	223	Hodgkinson v. Fernie	445
v. Joseph	485	Hodsoll v. Stallebras	475
Hetfield v. Central, &c.	296	Hoe's Case	142
v. Towsley	120	Hogan v. Cregan	511, 518, 519
Hewes v. Parkman	272	Hogue v. Penn	223
Hewett v. Swift	405, 444	Holbrook v. Utica	331
Hewitt v. Melton	492	Holdridge v. Utica	590
v. Prime	513, 520	Holladay v. Kinnard	545
Hext v. Jarrell	11	Hollenbeck v. Berkshire, &c.	345
Heyer v. Carr	265	Holliday v. Camsell	230
Hibbard v. Foster	239, 608	v. Gamble	476
v. N. Y., &c.	410	Hollis v. Goldfinch	400
Hickenbotham v. Lowenbein	21	v. Wells	517
Hickox v. Fay	203	Holly v. Brown	3, 12, 240

Holly v. Huggeford	7, 182	Howe v. Buffalo	472
Holman v. King	487	v. Butterfield	24
v. Townsend	358	v. Newmarch	408, 409
Holmes v. Clark	458	v. New Orleans	389
v. Clifton	143	v. Plainfield	370
v. Doane	5	v. Sheppard	270
v. Nuncaster	126	Howell v. Wright	438
v. Peck	479, 480, 482	Howth v. Franklin	533, 535
v. Wilson	6	Howze v. Green	98
Holroyd v. Breare	110	Hoyes v. Jones	203
Holt v. Penobscot	370, 384	Hoyt v. Van Alstyne	188
Home v. Mason	101	Hubbard v. Concord	373
v. Oswego	567	v. Lyman	64
Homesly v. Elias	318	Hubbell v. Root	165
Honey v. Starr	201	Hubbersty v. Ward	408, 442
Hood v. N. Y., &c.	319	Hubenor v. New Orleans	33
v. Palm	260	Hudler v. Golden	220
Hook v. Galloway	66	Hudson River, &c. v. Lounsberry	553
Hooker v. New Haven, &c.	312	Hudspeth v. Wilson	60
v. Smith	253	Huggins v. Toler	450
Hooksett v. Concord	352	Hughes v. Baltimore	389
Hooper v. Chicago	322, 553, 563	v. Person	202
v. Haskell	499	Huguenin v. Rayley	81
v. Lane	201, 204	Hulett v. Swift	533
v. Wells	584, 587	Hull v. Blaisdell	125
Hoopes v. Meyer	606	v. Clark	69
Hope v. Cason	12	v. Richmond	357, 362, 364, 365, 369, 372
Hopkins v. Westcott	580, 593	Hume v. New York	363
Hopper v. Reeve	500	Humphrey v. Douglass	14
Hoppin v. Jenckes	204	v. London, &c.	10
Hopple v. Brown, &c.	357	Humphreys v. Armstrong	357
Horn v. Baltimore	397	v. Pratt	170
Horne v. Briggs	66	Hunnewell v. Hobart	4
Horsly v. Branch	33	Hunt v. Ballew	125
Horton v. McMurtry	472	v. Hanover	383
v. Reynolds	70	v. Holton	45
Hortsman v. Covington, &c.	354	v. Hunt	93
Hotchkiss v. Hunt	28	v. Kane	50
v. The Artisans', &c.	283	v. Penn.	459
Hough v. New Orleans, &c.	347	v. Pratt	138
Houghton v. Lynch	528	v. Printup	491
v. Swarthout	112	v. Rich	364
v. Wilson	201	v. The Cleveland, &c.	575
Houldon v. Smith	114	Hunter v. Harris	136
Housatonic v. Waterbury	341	v. Hudson, &c.	441
Houser v. Hampton	142, 148	Hunting v. Russell	232
v. Tully	538	Huntley v. Dows	557
Houston v. Blake	163	v. Ratliff	503
v. Dyche	39	v. Russell	91, 92
Hover v. Barkhoof	357	Huppert v. Morrison	17
Hovey v. Lovell	147	Hurd v. Vermont, &c.	465, 466
Howard v. Babcock	528	Hursh v. Byers	543
v. Clark	176	Hurst v. Great	330
v. Crawford	213	Hurt v. Southern	322
v. North Bridgewater	365	Huston v. Cincinnati	346
v. Smith	179	v. Peters	586
v. Snelling	239	Hutcheson v. Blakeman	440
v. Wile	549	v. Peck	510
Howe v. Bartlett	137		

Hutchings v. Ladd	556	Indianapolis v. Love	463
v. Western, &c.	592	v. McAhren	344
Hutchins v. Carver	140	v. McClure	332
v. Hutchins	256	v. Marshall	346
Hutchinson v. Birch	20	v. Meek	341
v. The York, &c.	457,	v. Miller	389
	463	v. Mustard	551
Hutson v. New York	358, 363	v. Oestel	343
Hutton v. Arnett	34	v. Renner	341
Huxley v. Hartzell	53	v. Rutherford	332,
Huyett v. Philadelphia	352		334
Hyde v. Cooper	158	v. Shimer	339
v. Jamaica	375, 382	v. Skeen	453
v. Noble	30, 239	v. Snelling	342, 344
v. Stone	70	v. Solomon	349
v. Trent, &c.	561	v. Townsend	341
Hyland v. Paul	531	v. Wright	342
I.			
Iasigi v. Brown	86	Ingalls v. Bills	589
Ide v. Gray	73	v. Brooks	557
Illinois, &c. v. Adams	551	v. Bulkley	54
v. Baches	332, 352	v. Lord	63
v. Buckner	331	Ingallsbee v. Wood	534, 538, 542
v. Copeland	562, 592	Ingersoll v. Jones	512, 519
v. Cox	469	v. Stockbridge	349
v. Dickerson	342	v. Van Bokkelin	70
v. Downey	274	Ingerson v. Miller	512
v. Finnigan	350	Inos v. Winspear	115
v. Galena	301	Ireson v. Pearman	487
v. Goodwin	338	Irvin v. Fowler	608
v. Grabb	501	Irwin v. Brown	239
v. Jewell	464	v. Covode	91
v. Kanouse	350	v. Dearman	519
v. McLelland	351, 561	Isaacs v. Gorham	203
v. McKee	337	v. Third	303
v. Middlesworth	345	Isbell v. N. Y., &c.	339
v. Mills	351	Ives v. Strong	158
v. Phelps	338, 341	Izett v. Mountain	576
v. Read	316	J.	
v. Slatton	330	Jackman v. Partridge	602
v. Smyser	317	Jackson v. Anderson	31
v. Sutton	328	v. Andrew	91
v. Waters	314, 551	v. Brownson	89
v. Whittemore	328	v. Chicago	313
v. Wren	340	v. Hampton	212
Imloff v. Chicago	353, 589	v. Pearson	398
Indermaur v. Dames	457	v. Robinson	529
Indiana, &c. v. Gapen	341	v. Sacramento, &c.	564
v. Mundy	332	v. Todd	239
Indianapolis v. Adkins	339, 341	v. Walton	58
v. Allen	584	v. Woods	265
v. Cox	594	Jacobs v. Hamilton	357
v. Elliott	341	v. Hooker	563
v. Huffer	393	v. Remsen	189
v. Irish	346	v. Seward	228
v. Leaman	341	Jacoby v. Laussat	70
		James v. Biddington	506

James v. Christy	522	Johnson v. Whitman	201, 203
v. Greenwood	527	v. Winona	587
v. Gurley	142	Johnston v. S. W. R.R. Bank	290
v. Yates	196	Jones v. Allen	63
Jaquith v. Richardson	365	v. Andover	359
Jarvis v. Blennerhasset	270	v. Brown	227
v. Rogers	70	v. Cliffe	48
Jefferson v. Opel	220	v. Commonwealth	269, 446
Jeffersonville, &c. v. Applegate	341	v. Earl	574
v. Cleveland	557	v. Emery	73
v. Cotton	318	v. Fort	63
v. Dougherty	341	v. Hart	408
v. Hendricks	339, 589	v. Hatchett	532
v. Parkhurst	346	v. Hill	96, 97
v. Rogers	274, 325	v. Hoyt	456
v. Swift	339	v. Hutchinson	178
v. White	574	v. New Haven	393
Jeffery v. Bastard	209	v. North	551
Jeffries v. Great, &c.	27	v. Norwich	596
Jencks v. Coleman	587	v. Richmond	393
Jenkins v. Betham	119	v. Rogers	36
v. McConico	63	v. Seward	201
v. Motlow	528	v. Waltham	383
v. Troutman	132	v. Welch	246, 254
Jennings v. McConnel	478	v. Western, &c.	547
v. Maddox	12	v. Wolcott	493
Jewell v. Mills	23	Jordan v. Boone	538
Jewett v. Whitney	17, 238	v. Fall River, &c.	592
Jillson v. Wilbur	504	v. Gallup	137
Jobson v. Fennel	150	v. Hanson	112
Johns v. Church	167	v. Shireman	32
Johnson v. Arabia	63	Jourdan v. Reed	527
v. Atlantic, &c.	312, 313	Judah v. Trustees, &c.	478, 487
v. Babcock	184, 185	Judson v. Cook	243, 254
v. Bank	445	v. New York, &c.	301
v. Barber	445	v. Western, &c.	320, 555
v. Bruner	456	Junction v. Boyd	296
v. Cumming	66	Justice v. Mendell	249
v. Davis	260		
v. Dicken	500		
v. Goodwin	237		
v. Grand, &c.	162		
v. Hannahar	267, 268		
v. Haverhill	358, 363, 364, 370		
v. Leigh	24		
v. Lightsey	586, 597		
v. Maxon	201		
v. Midland	314		
v. New York, &c.	566		
v. Powers	28		
v. Richardson	534, 539		
v. Semple	484		
v. Stone	141, 158, 592, 595		
v. Swain	232		
v. Tanglinger	70		
v. Toulmin	233		
v. Weedman	35		
v. White	614		

K.

Kaiser v. Kellar	436
Kaley v. Shed	70
Kane v. Drake	74
v. Haywood	478
Kavanagh v. Brooklyn	101
Kavanaugh v. Janesville	498
Keble v. Hickringill	5
Keech v. Baltimore, &c.	343
Keeler v. Fassett	60
Keen v. Hartman	505
Keeney v. Good	500
v. Grand	551, 580, 584
v. Leas	122
Keepers, &c. v. Alderton	91
Keisel v. Earnest	227
Keith v. Easton	364
Keithler v. Foster	195

Keller v. Donnelly	514, 516	King v. Orser	406
Kellogg v. Chicago	313	v. Paterson, &c.	275, 280
v. Sweeney	534, 537	v. Police, &c.	357
Kelly v. Bemis	113	v. Rice	196, 197
v. Donahoe	603	v. Rippon	401
v. Lane	162	v. Shepherd	567, 568, 574
v. New York	430, 439	Kingman v. Pierce	61
v. Smith	456	Kingsbury v. Buchanan	146
Kelsey v. Berry	542	Kinlyside v. Thornton	97
v. Griswold	40	Kinney v. Central	328
Kemp v. Farlow	528	Kirby v. Boylston, &c.	608
v. S. E. L. R.	297	Kirk v. Whittaker	202
Kempland v. Macauley	154	Kirkpatrick v. Lex	256
Kempton v. Cook	268	v. Lockhart	520
Kendall v. London	551	v. Winans	441
v. Stokes	124	Kirksey v. Dubose	127
v. Wilson	83, 262	v. Pryor	164
Kendrick v. McCrary	514, 515, 520	Kirtland v. Montgomery	528
Keniston v. Little	130	Kisling v. Shaw	478
Kennard v. Burton	522	Kittle v. Fremont	389
Kennedy v. Ashcraft	530	Kittredge v. Milwaukee	356
v. Hammond	617	Klauber v. American	567, 571
v. Parke	442	Klein v. Crescent	300
v. Strong	40, 69	v. Hentz	499
Kennett v. Witherington	297	Klopfer v. Bromme	518, 519
Kenrig v. Eggleston	580	Knapp v. Hyde	36
Kent v. Willey	23	Knight v. Barker	66
Kepler v. Barker	215	v. Coates	228
Keplinger v. Sherrick	520	v. Fox	430
Kerbey v. Denby	19	v. Legh	237
Kerr v. Willan	584	v. Pontchartrain	330
Kesse v. Chicago	319	v. Portland	320, 587
Keyes v. Howe	602	v. Wilcox	515, 519
Keyworth v. Hill	503	Knorr v. Germantown, &c.	297.
Kidd v. Dennison	90	Knott v. Cunningham	262
Kidder v. Barker	145, 158, 213	Knowles v. Dabney	567
Kidzie v. Sackrider	117	v. Davis	115
Kier v. Peterson	91	Knowlton v. Bartlett	154
Kilbourne v. Frellsen	160	v. Erie	583
Kilby v. Stanton	513	Knox v. Marshall	189, 238
Kilgore v. Wood	65	v. North, &c.	529
Killey v. Scannell	137	v. Rives	550
Killion v. Power	408	Koch v. Branch	574
Kimball v. Alcorn	122, 123	Koehler v. Iron Co.	401
v. Bath	367	Koger v. Donnell	133
v. Billings	65	Kohne v. Ins. Co.	63
v. Bosten	471	Korah v. Ottawa	421
v. Comstock	84	Kowing v. Manly	601
v. Cushman	424	Kreger v. Osborne	157
v. Harman	256	Kreig v. Wells	521
v. Rutland, &c.	546, 575	Kremer v. Southern	557
v. Western, &c.	315	Krender v. Woolcott	549
Kincaird v. Scott	96	Krohn v. Sweeney	535, 541
King v. Boston, &c.	275, 463, 466	Kroy v. Chicago	470
v. Dickerman	231	Krum v. King	150
v. Dunn	12	Kuehn v. Wilson	529
v. Kirby	204	Kyle v. Gray	47
v. Macon	322	v. Laurens, &c.	319
v. Morris	350	Kyle, &c.	187

L.

<i>Labar v. Taber</i>	559	<i>Laveroni v. Drury</i>	567
<i>Lackawanna v. Chenewith</i>	316, 339	<i>Lawler v. Baring</i>	397
<i>v. Doak</i>	350	<i>Lawrence v. Great, &c.</i>	312
<i>Lackey v. Holbrook</i>	21	<i>v. Rice</i>	153
<i>Lacour v. New York</i>	388	<i>v. Stonington, &c.</i>	283
<i>Ladd v. Hill</i>	236	<i>v. Winona</i>	561
<i>Ladue v. Griffith</i>	562, 576	<i>Lawrenceburgh v. Montgomery</i>	597
<i>Lafayette v. Adams</i>	332	<i>Laws v. North Carolina, &c.</i>	343
<i>v. Hoffman</i>	295	<i>Lawson v. The State</i>	132
<i>v. New Albany, &c.</i>	300	<i>Lawton v. Adams</i>	231
<i>v. Shriner</i>	341	<i>v. Cardell</i>	22
<i>v. Sims</i>	314, 335	<i>Layman v. Hendrix</i>	267
<i>Laffin v. Willard</i>	192, 193	<i>Lea v. Henderson</i>	519
<i>Laing v. Colder</i>	330	<i>Leach v. Cassidy</i>	122
<i>Laird v. Eichold</i>	533, 534	<i>v. Fowler</i>	478
<i>Lakeman v. Grinnell</i>	555	<i>v. Francis</i>	17
<i>Lalor v. Chicago</i>	469	<i>v. Millard</i>	505
<i>Lamb v. Camden</i>	529, 584	<i>v. Pine</i>	180
<i>v. Stone</i>	258	<i>Leader v. Moxon</i>	438
<i>v. Western, &c.</i>	317	<i>Learned v. Haley</i>	478
<i>Lambar v. St. Louis</i>	391	<i>Leavenworth v. Laing</i>	362
<i>Lambard v. Fowler</i>	152	<i>Leavitt v. Gushee</i>	259
<i>Lambert v. Benner</i>	574	<i>v. Stanton</i>	288
<i>v. Snow</i>	203	<i>Le Barron v. East Boston</i>	599
<i>Lambeth v. Warner</i>	90	<i>Ledyard v. Jones</i>	141, 193
<i>Lamplcy v. Scott</i>	528	<i>Lee v. Bayes</i>	246
<i>Lancaster v. Lane</i>	207	<i>v. Fulkerson</i>	150
<i>v. Parnaby</i>	395	<i>v. Hefley</i>	524
<i>v. Smith</i>	527	<i>v. Hodges</i>	512
<i>Landcks's, &c.</i>	187	<i>v. McKay</i>	417
<i>Landon v. Emmons</i>	33	<i>v. Marsh</i>	314
<i>Landott v. Norwich</i>	366, 367	<i>v. Mathews</i>	447
<i>Lane v. Cotton</i>	437, 444, 551	<i>v. Meeker</i>	13
<i>v. Crosby</i>	110	<i>v. Robinson</i>	246
<i>v. Dixon</i>	3	<i>v. Sandy</i>	408
<i>v. Dobyns</i>	237	<i>Leglise v. Champante</i>	224
<i>v. Hitchcock</i>	617	<i>Lehigh v. Lazarus</i>	299
<i>v. Old Colony, &c.</i>	599	<i>v. Trone</i>	313
<i>v. Phillips</i>	472	<i>Leighton v. Hall</i>	206
<i>Langdon v. Bruce</i>	251	<i>Lemit v. Mooring</i>	142
<i>v. Summers</i>	199	<i>Lemmon v. Chicago</i>	346
<i>Langley v. Boston, &c.</i>	349	<i>Lempriere v. Pasley</i>	47
<i>v. Brown</i>	581	<i>Leonard v. Hendrickson</i>	549
<i>Langworthy v. New York, &c.</i>	599	<i>v. Johnson</i>	194
<i>Lannen v. Albany, &c.</i>	408	<i>v. Scarborough</i>	227
<i>Lannock v. Brown</i>	20	<i>v. Stacy</i>	254
<i>Lansing v. New York</i>	463	<i>v. Tidd</i>	38
<i>v. Stone</i>	93	<i>v. Winslow</i>	600
<i>Lashley v. Cassell</i>	192, 478	<i>Leslie v. Briggs</i>	235
<i>Lathrop v. Blake</i>	162	<i>v. Pounds</i>	607
<i>Latimer v. Wheeler</i>	50	<i>Levering v. Union</i>	571
<i>Latterett v. Cook</i>	148	<i>Levi v. Lynn</i>	304
<i>Lauderbrun v. Duffy</i>	298	<i>v. Waterhouse</i>	577
<i>Laugher v. Pointer</i>	415, 422, 423, 429	<i>Levy v. Bergeron</i>	527
<i>Lauham v. Vaughan</i>	197	<i>v. New York</i>	389
<i>Laval v. Rowley</i>	129	<i>v. Shockley</i>	170
		<i>Lewis v. Blair</i>	146
		<i>v. Collard</i>	482
		<i>v. Galena</i>	553

Lewis v. Great, &c.	577	Lohman v. New York, &c.	277
v. Hodges	515	Loker v. Brookline	366
v. Johns	243	Lombard v. Oliver	219
v. Jones	157	Lomery v. State	259
v. Littlefield	63	Long v. Billings	208
v. Ludwick	566	v. Orsi	488
v. McAfee	530	Longfellow v. Quimby	2, 9, 238
v. Mobley	43, 601	Lonsdale (Earl of) v. Nelson	16
v. Morse	168	Loomis v. Wheeler	127
v. New Orleans	391	v. Wilbur	93
v. New York	322	Loonan v. Brockway	460
v. Park	285	Loosemore v. Radford	63
v. Smith	552, 598	Lord v. Midland	330
v. Western, &c.	314	Loring v. Mulcahy	52
Lexington, &c. v. McMurtry	111	v. Warburton	605
Libby v. Soule	157	Losee v. Buchanan	273, 406
Lichtenhein v. Boston, &c.	317, 531,	v. Lacey	193
	532	Lothrop v. Arnold	188, 236
Lick v. Madden	133, 218	Louisville v. Ballard	343
Liddle v. Keokuk	345	v. Collins	464
Lienow v. Ritchie	612	v. Glazebrook	295, 296
Liford's Case	94	v. Mahan	592
Lillard v. Whittaker	69	v. Milton	341
Limburger v. Westcott	585	v. Robinson	464, 470
Lindeneau v. Desborough	81	v. State	300
Lindley v. Downing	39	Loveden v. Loveden	507
Lindsay v. Hoke	240	Lovejoy v. Jones	49
Lindsey v. Cook	190	Loveland v. Berlin	357
Liner v. Johnson	544	Lovett v. Salem, &c.	333
Linford v. Fitzroy	112	Lovier v. Gilpin	187
Linsley v. Bushnell	428	Low v. Martin	530
Linton v. Commonwealth	199	v. Mumford	237, 242
Lipe v. Eisenlerd	514, 515	Lowe v. Booth	581
Litt v. Cowley	38	v. Lowmby	190
Little v. Fossett	601	v. Miller	229
v. Washburn	562	v. Moss	570
v. Wetmore	410	Lowell v. Boston, &c.	347, 380, 435
Littledale v. Littledale	435	v. Sargent	566
Littleton v. Richardson	372, 380	v. Spaulding	607
Lively v. Ballard	450	Lowenthal v. New York	388
Livermore v. Bagley	194	Lowremore v. Berry	62
v. Freeholders, &c.	402	Lowther v. Earl of Radnor	110
Liverpool v. Fairhurst	503	Lubert v. Chauviteau	450
Livingston v. Bishop	267	Lucas v. Nockells	140
v. Cox	481	v. San Francisco	220
v. Haywood	87	v. Trumbull	29
Livor v. Orser	135	v. Wasson	227
Lloyd v. Barden	527	Luckey v. Frantzkee	607
v. Bellis	246, 271	v. Roberts	36, 260
v. New York	439	Ludden v. Leavitt	163
v. Pacific	346	Lumley v. Gye	476
Load v. Green	80	Lund v. Tyngsboro	377
Loan v. Boston	363	Luttrell v. Hazen	408
Locke v. Garrett	70	Lyford v. Toothaker	612
Lockwood v. Perry	161	Lygo v. Newhold	589
Lockyer v. Lockyer	508	Lyle v. Barker	70
Loeschigk v. Peck	80	Lyman v. Amherst	363
Lofland v. Jefferson	129	v. Boston	352
Logan v. Mathews	529	v. Dow	181

Lynde v. McGregor	73, 74	McDonald v. Edgerton	533, 536
Lyon v. Gorcee	135	v. Leewright	146
v. Hunt	99	v. Snelling	418
v. Mells	582	v. Trafton	73
v. Smith	535	v. Western	321
v. Tams	454	v. Wilkie	126
Lyons v. Martin	412	McDonough v. Virginia	387
v. Woodward	499	McDougald v. Dougherty	188
M.		McDowell v. Baker	484
McAleer v. Horsey	75	McElhaney v. Flynn	130
v. McMurray	82	McElhenny v. Wylie	255
McAndrew v. Electric, &c.	575	McEntee v. New Jersey	575
McAnelly v. Chapman	28	McEvers v. Steamboat, &c.	530
McAulay v. Birkhead	517, 520	McEwer v. Jeffersonville	559
v. Western, &c.	296	McFadzen v. Ollivant	506
McBurney v. Martin	203	McGavnell v. Murphy	234
McCahon v. County	122	McGatrick v. Wason	431
McCall v. Brock	573	McGee v. Givan	190
v. Capehart	5	v. Overby	249
v. Chamberlain	34t, 350	McGill v. Ash	232
v. Reybold	231	v. Rowand	591
McCalla v. Multnomah	357	McGinn v. Warden	64
McCamus v. Citizens, &c.	429	McGlynn v. Brodie	460
McCance v. London	580	McGough v. Wellington	146, 176
McCarthy v. Guild	522	McGowan v. Windham	357
v. Metropolitan	394	McGran v. Bookman	8
v. Syracuse	388	McGregor v. Brown	193
v. Wolfe	530	McGunigal v. Mong	473
McCarty v. Vickery	4	McGuire v. Butler	526
McCay v. Wait	89	v. Grant	408
McClary v. Lowell	378	McHenry v. Philadelphia, &c.	557, 567, 568
McCleary v. Kent	433	McIntire v. Randolph	380
McClellan v. Genness	229	McIntyre v. New York, &c.	333, 335
McClenaghan v. Brock	413, 587	McKay v. Draper	527
McCloon v. Beattie	162	v. Hamblin	527
McCluer v. Manchester, &c.	547	v. Thorington	197
McClure v. Philadelphia	326, 328	v. Treadwell	188
McCluskey v. McNeely	153	v. Wait	97, 99
McCombie v. Davies	29, 442	McKee v. Owen	596
McConeghy v. McCaw	618	McKeen v. Gammon	99
McConike v. New York, &c.	529	McKenna v. Fisk	2
McCool v. The State	73	McKennan v. Bodine	217, 225
McCormick v. Fitch	122	McKenzie v. Barnes	216
McCoy v. California	346	McKeon v. Citizens'	335
McCrackan v. Cholwell	80	McKernan v. McDonald	202
McCready's Case	506	McK. Ormsby v. Morris	178
McCreery v. Willett	211	McKinley v. Tucker	150
McCrillis v. Hawes	272	McKinney v. The Ohio, &c.	341
McDaniel v. Chicago	551	v. Western, &c.	498, 500
v. Edwards	512	McKinzie v. Baltimore	17
v. Emanuel	475	v. Smith	202
McDaniels v. McDaniels	240	McKnight v. Morgan	79
v. Robinson	534, 535, 536	McLauchlin v. Charlotte, &c.	303
McDermott v. Pacific, &c.	468, 469	McLaughlin v. Pryor	412
McDonald v. Bunn	141	McLean v. Burbank	599
v. Chicago	353	v. Burtant	587
		v. Cook	125
		v. Walker	61

McLeish v. Tylee	65	Mansfield v. Wilkerson	485
McLeod v. Jones	18	Manville v. Cleveland, &c.	465
McMahon v. Davidson	468	Manwell v. Briggs	49
v. Green	154	Maples v. New York	328
v. McGraw	455	Marble v. Keyes	2, 56
McManus v. Crickett	408	v. Worcester	376
v. Lancashire, &c.	315, 575	March v. Portsmouth, &c.	312
McMichael v. McDermott	180	Marine, &c. v. Birney	288
v. Mason	158	v. Chandler	292
McMillan v. Michigan	350, 363, 565	v. Fulton	283
v. Saratoga, &c.	347, 462, 585	Marion v. Faxon	170
McMurray v. Shuck	184	Marker v. Kenrick	610
McNabb v. Lockhart	528	Marlatt v. Levee, &c.	274
McNair v. McLennan	442	Marlborough (Duke of) v. St. John	94
McNaught v. Chicago	341	Maroney v. Old	328
McNear v. Atwood	40	Marriam v. Yeager	32
McPadden v. New York	295	Marsh v. Bancroft	209
McPherson v. Neuffer	28	v. Horne	576
v. Pemberton	271	v. The Oneida, &c.	286
Maccoun v. Indiana, &c.	277	v. White	138
Machin v. Geortner	14	v. Williams	115
Machu v. London, &c.	347	Marshall v. Cohen	606
Macklin v. New Jersey	585	v. Gray	75
v. Waterhouse	580, 585	v. Oaks	506
Macomber v. Baker	619	v. Stewart	459
v. Taunton	369	v. Town	160
Macon v. Johnson	338	v. Wells	560
Macrom v. Great	592	v. Wing	524
Madison, &c. v. Bacon	463	v. York, &c.	474
Mad River, &c. v. Barber	462	Martin v. Cuthbertson	527
v. Fulton	595	v. England	45
Maffit v. Commonwealth	506	v. Knowllys	234
Magee v. Holland	521	v. Martin	134
v. Scott	49	v. Moot	223
Maghee v. Camden	563	v. Zellerbach	138, 139
Maguyer v. Hawthorne	28	Martinez v. Gerber	475
Mahoney v. Metropolitan	374	Martyn v. Payne	513
Main v. Bell	167	Marvin v. Buchanan	455
v. McCarty	154	Mason v. Cæsar	14
Maine Stage Co. v. Longley	553	v. Ellsworth	371, 380
Malden, &c. v. Charlestown	381	v. Kenebec, &c.	297, 299
v. Fyson	495	v. Lambert	96
Mallory v. Tioga, &c.	547	v. Stiles	610
Maltby v. Chapman	537, 540, 541	v. Thompson	533, 534, 537
Manchester v. Manchester	204	v. Vance	125, 128
Manderschild v. Dubuque	375	Mass v. Bartlett	202
Mandlove v. Burton	45	Master v. Walsh	261
Mangum v. Hamlet	199	Masterton v. Beers	75
Manhattan, &c. v. Lydig	290	Mateer v. Brown	534, 542
Manly v. Field	514	Matheny v. Johnson	47, 156
Mann v. Birchard	318, 338, 584	v. Wolffs	374, 434
v. Blanchard	84	Mathew v. Sherwell	63
v. Macon	343	Mathews v. Harsell	474
v. State	519	Matlock v. Strange	110
Manning v. Hollenbeck	542	Matteson v. New York	458
v. McDonnell	9	Matthews v. Coe	69
v. Wells	536	v. Fiestel	503
Mansfield v. Sumner	183	v. Menedger	246
		v. Rice	524

Matthews v. West London, &c.	425	Merritt v. Old Colony	316
Matthis v. Pollard	135, 150, 152	Merryman v. David	454
Maund v. Mon. Canal, &c.	274	Mersereau v. Norton	236
Mauro v. Buffington	478	Mersey v. Gibbs	387, 394, 437
Maury v. Coyle	285, 527	Mershon v. Commonwealth	198
Maverick v. Eighth	587	v. Hobensack	544
Maxwell v. Harrison	29	Merwin v. Butler	558
v. Houston	601	Metcalf v. Hess	538
v. Pike	218	v. Stryker	150, 202
May v. Bliss	270, 417	Metcalf v. London, &c.	553, 583
v. Hanson	597	Meyer v. Amidon	75, 192
v. Harvey	239	v. Chicago	559
v. Princeton	376	v. Pacific	334
v. Shumway	204	v. People's R. Co.	335
v. Slade	238	Michigan, &c. v. Bivens	559
Mayall v. Boston, &c.	554, 555	v. Fisher	346
Mayberry v. Standish	360	v. Leahey	436, 469
Mayhew v. Eames	585	v. McDonough	551, 570
v. Herrick	227, 272	v. Meyres	555, 590
Maynard v. Tidhall	13	v. Mineral	585
Mayo v. Boston	337	v. Schurtz	556
Mayor, &c. v. Bailey	387	v. Ward	561, 578
v. Cunliffe	397	Middleton v. Fowler	421
v. Eschbach	402	v. Price	141
v. Furze	387	Midland v. Daykin	419
v. Howard	529	Milburn v. Gilman	128
v. Lasser	440	v. The State	141
v. Turner	273	Miles v. Cattle	595
Mead v. Hamond	415	v. Hannibal	343
Meader v. Stone	502, 606	Milford v. Holbrook	380
Mechanics', &c. v. Earp	284	Mill v. Galbreth	131
v. Merchants', &c.	285	Millar v. Thompson	514
v. New York, &c.	11, 278, 279	Miller v. Bryan	132
Mechanicsburg v. Meredith	380	v. Commonwealth	147, 171
Meeds v. Carver	140	v. Grice	126
Mellen v. Western, &c.	312	v. Grove	27, 49
Melville v. Brown	236	v. Rucker	102
Memphis v. Whitfield	355	v. Searle	105, 106, 114
Menkens v. Menkens	63	v. Shaw	248
Mentz v. Second	336	v. Steam Navigation Co.	561, 562
Mercantile v. Chase	549, 578	v. Sweitzer	242, 503
Mercer v. Jackson	463, 522	v. Thompson	245
v. Jones	63, 70	v. Wilson	485
Mericle v. Mulks	136, 222	Millhouse v. Patrick	609
Merihew v. Milwaukee, &c.	314	Milligan v. Wedge	432, 439
Merle v. Haskell	451	Mills v. Collet	110
Merriam v. Cunningham	524	v. Martin	223
v. Hartford, &c.	554	v. Michigan	563
Merrick v. Brainard	548, 553, 601	v. Mills	478
v. Van Santvoord	401	Milne v. Smith	420
v. Webster	572	v. Wood	205
Merrill v. Gold	77	Milwaukee v. Davis	374
v. Grinnell	592	v. Fairchild	560
v. Hempden	363, 372	v. Finney	410
v. Palmer	150	v. Milwaukee, &c.	301
Merritt v. Carpenter	204	Minor v. Smith	200
v. Claghorn	534	Mires v. Solebay	27, 45, 443, 445
v. Earle	544, 568		

Mississippi v. Kennedy	593	Moore v. Wilson	550
v. Miller	346	Moore v. Carter	502
Mitchell v. Crassweller	414, 416, 418	v. Wait	88
v. Hackett	198	Moorsum v. Moorsum	508
v. Mims	408	v. Whitney	251
v. Osgood	152	Moran v. Dawes	514, 517
v. Rome, &c.	278	v. McCleary	121
v. Smith	267	v. Portland, &c.	553
v. Williams	48, 252	Moreton v. Hardern	262
Mitcheson v. Foster	143	Morewood v. Pollok	571
Mixer v. Excelsior	177	Morey v. Newfane	357
Mobile v. Franks	352	Morgan v. Bowman	425
v. Hopkins	320, 594	v. Bradley	64
v. Jarboe	584	v. Chester	150
v. Malone	341	v. Dudley	120
v. Prewett	318	v. Hallowell	361
Moens v. Heyworth	73	v. Hughes	120, 155
Mohawk (Case of the)	573	v. Ide	601
Moir v. Hopkins	417	v. Larned	95
Moller v. Azzar	202	v. Spangler	147, 161
Monnot v. Ibert	49	v. Vance	123
Monongahela, &c. v. Coons	295	Morley v. French	230
Montague v. Lord Sandwich	48	v. Gaisford	407
Montfort v. Hughes	265, 406	Morrill v. Aden	524
Montgomery v. Alley	283	v. Graham	480, 484
v. Edmonds	571	Morris v. Ayres	558, 564, 565
v. Edwards	313	v. Barclay	256
v. Evans	602	v. Hall	36, 46
v. Wilmington, &c.	342	v. Miller	507
Moody v. Board	393	v. Moulton	28
v. Buck	228	v. Pugh	48
v. Burton	258	v. The Gas Co.	275
v. Hinkley	10	v. Thompson	50
v. Osgood	363, 372	Morrison v. Davis	568, 572
Mooers v. Larry	530	v. Lawrence	393
Moon v. Raphael	71	v. Mullin	171
Mooney v. Williams	111	v. Ogdensburg	473
Moor v. Ames	119	v. Wright	129
Moore v. Abbot	371	Morristown v. Moyer	359
v. Aldrich	54	Morrow v. Belcher	243
v. Appleton	472	Mors v. Sluce	546
v. Bowman	173	Morse v. Androscoggin, &c.	601
v. Collishaw	231	v. Auburn, &c.	347
v. Eldred	65	v. Brainard	322
v. Evans	575	v. Knowlton	179, 194
v. Fitchburg	275	v. Marshall	10
v. Fitz	181	v. Morse	176
v. Gholson	527	v. Richmond	364, 377
v. Jarrett	152	v. Smith	161
v. McKibbin	36	Mosey v. Troy	367, 374
v. Mason	606	Moseley v. Wilkinson	70
v. Massini	237	Moses v. Boston, &c.	315, 575
v. Michigan, &c.	319	v. Pittsburg, &c.	301
v. Noble	79	v. Walker	47
v. Sanborne	409, 422	Mosher v. Southern	562
v. Thompson	442	Moshier v. Utica, &c.	341
v. Townsend	93	Moss v. Johnson	461, 597
v. Turbeville	81	v. Pacific	468
v. Westervelt	134, 165	Mosser v. Mosser	507

Mostyn v. Fabrigas	107, 109	Nave v. Baird	488
Mote v. Chicago	590	Neal v. Gillett	523
Moulton v. Jose	121, 140	v. Price	133
v. Norton	151	v. Wilcox	538
v. Sanford	367	Neale v. Weare Bank	62
Mount v. Derick	448	Nebraska v. Campbell	357
Mountford v. Gibson	70	Needles v. Howard	534
Mower v. Leicester	357	Neighbour v. Trimmer	112
Mowrey v. Walsh	80	Neil v. Beaumont	142, 143
Muggridge v. Eveleth	600	Nellis v. New York, &c.	319
Mulhado v. Brooklyn, &c.	333	Nelms v. Williams	195, 197
Mullen v. Ensley	70	Nelson v. Burt	58
Mullett v. Challis	132	v. Cowing	441
Mullings v. Bothwell	170	v. King	59, 527
Mulvehall v. Millward	512	v. Woodruff	570
Mumford v. Oxford, &c.	610	Nelthorpe v. Dorrington	239
Munch v. New York, &c.	340, 342	Nesbit v. Lockman	479
Munford v. Taylor	44	Nevins v. Bay State, &c.	575, 592,
Munger v. Hess	48		594, 596
Munn v. Pittsburgh	390	v. Peoria	392, 436
Munson v. Derby	356	New, &c. v. Higman	295
Munster v. South Eastern, &c.	594	v. Huff	298
Murchison v. White	614	v. O'Daily	304
Murdock v. Ripley	255	New Albany, &c. v. Aston	343
Murphey v. Caralli	423	v. Bishop	343
Murphy v. Chicago	300, 389	v. Campbell	565
v. Smith	465	v. Fix	344
v. Wilson	242	v. Maiden	341, 344
Murray v. Burlington	70	v. Pace	343
v. Clarke	533	v. Tilton	344
v. Ezdell	254	Newall v. Jenkins	259
v. Hall	232	New Brunswick v. Tiers	567, 568
v. Lovejoy	172, 263	Newcastle, &c. v. North, &c.	300
v. Mann	73	v. Vane	88
v. South Carolina	352	Newhall v. Paige	529
Murtaugh v. St. Louis	387	N. H. Savings Bank v. Varnum	183,
Muschamp v. Lancaster, &c.	319		201
Mussey v. Scott	20, 605	New Hope, &c. v. Phœnix, &c.	292
Muzzy v. Davis	244	New Jersey v. Kennard	332
v. Howard	140	v. Merchants', &c.	583
		v. West	337
N.		Newkirk v. Sabler	16
		Newman v. Bennett	472
		v. Wilson	138
N. & C. Railway v. Messino	352	New Orleans, &c. v. De Lizardi	63, 70
Najac v. Boston, &c.	324	v. Field	341
Nall v. State	150, 210	v. Frederic	297
Nash v. Farrington	187	v. New Orleans	571
v. Lucas	20	v. Tyson	564
v. Whitney	143	Newsom v. New York, &c.	349
Nashua v. Worcester	562	Newstadt v. Adams	575
Nashville v. Elliott	459	Newton v. Agricultural	297
Nason v. Boston	367	New York, &c. v. Dryburg	420
v. Cockroft	446	v. New York	303
Natcher v. Natcher	450	v. Schuyler	278
Nathan v. Buckland	240	Nichols v. Boston	393
National Exchange Co. v. Drew	277,	v. Holliday	542
	441	v. Middlesex	330
Naugatuck v. Waterbury	319, 566	v. Nenson	44

Nichols <i>v.</i> Sixth	335	O'Barr <i>v.</i> Alexander	480
<i>v.</i> Thomas	128	O'Brien <i>v.</i> Boston	327
<i>v.</i> Valentine	164	Odom <i>v.</i> Shackelford	162
Nicholson <i>v.</i> Lancashire	325	O'Donnell <i>v.</i> Mullin	126
<i>v.</i> Stryker	514, 515	<i>v.</i> Providence, &c.	332
<i>v.</i> Willan	576	O'Donoghue <i>v.</i> Corby	60
Nickerson <i>v.</i> Dyer	225	<i>v.</i> French	502
<i>v.</i> Thompson	225	Ogden <i>v.</i> Coddington	553
Nicks <i>v.</i> Marshall	371	Ogle <i>v.</i> Atkinson	52
Nicoll <i>v.</i> American, &c.	413	O'Hagan <i>v.</i> Clinesmith	499
<i>v.</i> Glennie	250	O'Harra <i>v.</i> Portland	356
Nisbet <i>v.</i> Lawson	484	Ohio <i>v.</i> Davis	350
Niver <i>v.</i> Niver	201	<i>v.</i> Eaves	337
Nixon <i>v.</i> Phelps	487	<i>v.</i> Fitch	350
Noble <i>v.</i> Kelly	180	<i>v.</i> Hammersley	466
<i>v.</i> Prescott	202	<i>v.</i> Jones	338
<i>v.</i> Whetstone	193	<i>v.</i> Meisenheimer	338
Nolton <i>v.</i> Western, &c.	330, 587	<i>v.</i> Muhling	326
Nordemeyer <i>v.</i> Loescher	591, 600	<i>v.</i> Schiebe	334
Norman <i>v.</i> Bell	46	<i>v.</i> Tindall	463
Norris <i>v.</i> Litchfield	368, 466	O'Keefe <i>v.</i> Kellogg	64
Norristown <i>v.</i> Moyer	381	Okeson <i>v.</i> Patterson	603
North, &c. <i>v.</i> Collins	291	Oldfield <i>v.</i> New York, &c.	347
<i>v.</i> Dale	300	Oldham <i>v.</i> Sparks	484
<i>v.</i> Heilman	331	Oliver <i>v.</i> New York	324
<i>v.</i> Robinson	347	<i>v.</i> Northern	409
Northam <i>v.</i> Bowden	58	<i>v.</i> Walsh	237
Northampton, &c. <i>v.</i> Ames	615	<i>v.</i> Worcester	359, 387
Northern, &c. <i>v.</i> Page	325	Olmstead <i>v.</i> Brown	499
<i>v.</i> Scholl	349	Olmsted <i>v.</i> Hotailing	272
<i>v.</i> Sellick	574	Olzen <i>v.</i> Schierenberg	249
<i>v.</i> State	295, 335, 348	O'Mara <i>v.</i> Hudson	337
Northumberland <i>v.</i> Atlantic, &c.	303	O'Neil <i>v.</i> Harkins	299
Northwestern, &c. <i>v.</i> Sharp	479	Oppenheim <i>v.</i> Russell	599
Norton <i>v.</i> Kidder	28	Orange <i>v.</i> Berry	11
<i>v.</i> Nye	152	<i>v.</i> Placide	355
<i>v.</i> Wiswall	607	Orchard <i>v.</i> Rackstraw	543
Norvell <i>v.</i> Gray	5	Ord <i>v.</i> Chester	234
Norway, &c. <i>v.</i> Boston, &c.	318	Ormond <i>v.</i> Holland	456
Nowel <i>v.</i> Sands	10	Orr <i>v.</i> Union, &c.	288
Noxon <i>v.</i> Hill	115	Ortman <i>v.</i> Greenman	125
Noyes <i>v.</i> Colby	10	Osborn <i>v.</i> Robbins	36
<i>v.</i> Rutland	319	<i>v.</i> Union	599
<i>v.</i> Smith	456	Osby <i>v.</i> Conant	62
Nudd <i>v.</i> Wells	558	Osgood <i>v.</i> Blake	219
Nutt <i>v.</i> Wheeler	46, 176	<i>v.</i> Clark	219
Nutter <i>v.</i> Ricketts	44	Ouimut <i>v.</i> Henshaw	322, 323
Nutting <i>v.</i> Connecticut	319	Outlaw <i>v.</i> Gilmer	202
Nye <i>v.</i> Kellam	134	Overton <i>v.</i> Freeman	429, 431, 435
		<i>v.</i> Williston	58, 64
O.		Owen <i>v.</i> Hudson	335
Oakes <i>v.</i> Hill	219	<i>v.</i> Morton	232
<i>v.</i> Spaulding	244	<i>v.</i> Tankersley	502
Oakley <i>v.</i> Davis	492	Owens <i>v.</i> Derby	246
<i>v.</i> Post, &c.	568	<i>v.</i> Ranstead	146
		Oxford <i>v.</i> Peter	418
		Oystead <i>v.</i> Shed	142
		Ozier <i>v.</i> Hinesburgh	369

P.

Packard v. Northcraft	539	Parsons v. Winchell	406
Padelford v. Padelford	90	Partenheimer v. Van Order	249
Page v. Belt	133	Passenger v. Stutler	473
v. Carpenter	271	v. Young	328
v. Freeman	262	Paton v. Westervelt	149
v. New York, &c.	326	Patrick v. Colerick	15
v. Parker	406	Patten v. Halsted	214
v. Robinson	614	v. Rea	416, 418
Paige v. O'Neal	47	Patterson v. Anderson	172
v. Smith	547	v. Clyde	571
v. Willet	196	v. Miller	122
Pailhes v. Thielen	180	v. Moore	552
Painter v. Mayor	436	v. North Carolina	566
v. Pittsburgh	430	v. Parker	128
Palmer v. Andover	367, 375	v. Thompson	515
v. Crosby	128	Pattison v. Robinson	54
v. Portsmouth	359, 369	Paul v. Hummel	523
Pantam v. Isham	609	v. Slason	177
Pappa v. Rosa	102, 119	Paulnier v. Erie	268
Parish v. Golden	219	Pawlet v. Rutland, &c.	431
v. Wilhelm	140, 188	Payne v. Green	255
Park v. Long	148	v. The Governor	192
v. Pratt	501	Peachey v. Rowland	419, 435
Parker v. Boston, &c.	313	Peak v. Lemon	503
v. Chamblis	94	Pearce v. Atwood	125, 127
v. David	138	Pease v. Clayton	114
v. Downing	196	Peck v. Elder	237
v. Elliott	506	v. Ellsworth	358
v. Farebrother	454	v. Neil	588
v. Great, &c.	313, 547	v. Ward	231
v. Griswold	5	Peddicord v. Baltimore	296, 300
v. Hall	3	Peebles v. North	343
v. Huntington	257	Peek v. North, &c.	576
v. Macon	356	Peel v. Elliott	204
v. Meek	514, 515, 517	Peeler v. Stebbins	173
v. Middlebrook	28	Peer v. Humphrey	37
v. Norton	69	Peet v. Chicago, &c.	330
v. Patrick	37	Peixotti v. McLaughlin	594
v. Pattee	142	Pemberton v. New York	563, 571
v. Raymond	99	v. Smith	68, 189
v. Rolls	481	Pence v. Dozier	511
v. Smith	126, 130	Pendall v. Rench	567
v. Walrod	27	Pender v. Robbins	545
Parkerson v. Simons	250	Pendergast v. Adams	322
Parkhurst v. Jacobs	66	Penniman v. Freeman	180
Parks v. Boston	603	Pennington v. Yell	480, 481, 482, 483
v. Hall	141	Pennsylvania, &c. v. Books	348
v. Loomis	58	v. Buffalo	570
v. Sheldon	162, 167	v. Butler	584
Parmelee v. Fischer	592	v. Graham	357
v. Western	563	v. Henderson	316, 332, 339
Parrot v. Cincinnati	295	v. McCloskey	315, 580, 597
Parrott v. Barney	93	v. Ogier	347
v. Dearborn	164	v. Schwartz-	
Parry v. Frame	63	berger	296, 323
Parsons v. Monteath	577	v. Vandiver	348
		v. Zebe	597

Pennsylvania, &c. v. Zug	442	Phelin v. Kenderdine	518, 520
Penobscot, &c. v. Wilkins	167	Phelps v. Bostwick	602
Pensacola v. Nash	529	v. Gilchrist	167, 169
People v. Albany	122	v. London, &c.	593
v. Brotherson	484	v. Morse	3
v. Caryl	326	v. Wait	405
v. Chicago, &c.	318	v. Zuachlag	36
v. Davison	98	Philadelphia, &c. v. Com.	356
v. Ford	478	v. Derby	330, 347,
v. Harvey	478		416
v. Jillson	327	v. Harper	322
v. Jones	535	v. Spearen	302
v. Kerr	296, 303	v. Williams	296
v. Lott	143	v. Wilt	347
v. New York, &c.	354	Phillips v. Bridge	482
v. Olmstead	521	v. Brigham	574
v. Pease	218	v. Byron	129
v. Turner	511	v. Coudon	528
v. Warren	127	v. Lamar	148, 199
v. Whittemore	287	v. Veazie	381
v. Winters	506	Philpott v. Kelley	35
Percival v. Stamp	173	Phipps v. Millbury, &c.	282
Percy v. Millaudon	403, 528	Phoenix v. Clark	614
Perkins v. Blood	8	Pianciani v. London, &c.	593
v. New York, &c.	587	Pickard v. Collins	608
v. Plympton	156	v. Smith	424
v. Portland, &c.	562	Pickens v. Diecker	410, 424
v. Proud	193	Pickering v. Appleby	59
v. Smith	445, 447	v. Coleman	221
v. Thornburgh	135	v. Rudd	5
Perley v. Dole	60	Picketts v. Baltimore	322
v. Eastern	352	Pico v. Colimas	4
Perminter v. Kelly	228, 447	Picot v. Bates	74
Perrin v. Claffin	253	Pidgeley v. Rawling	89
Perry v. Buss	219	Pidgeon v. Williams	484
v. Carr	161	Piel v. Brayer	192
v. Chandler	618	v. Finch	327
v. Marsh	458	Pierce v. Gilson	60
v. Ricketts	468	v. Jackson	136
v. Thompson	586	v. Milwaukee	545
Persch v. Quiggle	527	v. O'Keefe	38, 531
Persse v. Willett	273	v. Pickens	8. 9
Peru, &c. v. French	502	v. Pierce	508
v. Hasket	341	v. Worcester	313
Pervear v. Kimball	150	Piggot v. Eastern, &c.	293, 352
Peter v. Bloeker	475	Pike v. Carter	111
v. Wright	74	v. Megoun	102
Peters v. Rylands	348	Pillott v. Wilkin	61
Peterson v. Clark	93, 613, 614	Pilmore v. Hood	78
v. Ferreby	296	Pilsbury v. Webb	452
Pettes v. Marsh	138	Pinkerton v. Woodward	535, 541
Pettibone v. Burton	427	Pinneo v. Lackawanna	296
v. Phelps	240	Piper v. Pearson	115
Pettigrew v. Barnum	534	Pitcher v. King	142
Petty v. Overall	529	Pitre v. Offut	570
Pewress v. Austin	454	Pitt v. Yalden	480
Pfau v. Reynolds	380	Pittman's Case	187
Pfeiffer v. Grossman	7	Pittsburg v. Dunn	337
Pharis v. Carver	28	v. Evans	337

Pittsburg v. Gilleland	312	Pozzoni v. Henderson	254
v. Hinds	328	Prather v. Lexington	391
v. Karns	331	Pratt v. Bogardus	208
v. McClurg	334	v. Gardner	108, 120
v. Manner	337	v. Hill	113
Pixley v. Clark	295	v. Ogdensburg	569, 597
Place v. Union, &c.	549, 558, 570	Pray v. Pierce	4
Planck v. Anderson	213, 215	Prell v. McDonald	122
Plant v. Long Island, &c.	300	Prentice v. Decker	594
Platt v. Brown	173	Prentiss v. Hannay	49
v. Potts	60	Presbrey v. Presbrey	232
v. Wells	560	Prescott v. Bancroft	209
Plumer v. Brown	47	v. Norris	524
Plymouth v. Colwell	296, 303	v. Wells	58
v. Painter	122	President (The) v. Wright	274
Poe v. Dorrah	134	Preston v. Bowers	260, 506
Poinsett v. Taylor	151	v. Eastern, &c.	312
Polhill v. Walter	74	Prewitt v. Clayton	6
Polk v. Allen	32	Price v. Hartshorn	568
Pollard v. Baker	161	v. Harwood	128
v. Woburn	374	v. Hewett	524
Polley v. Lenox, &c.	28, 46, 141, 161, 163, 164, 250	v. New Jersey	345
Pomfret v. Ricroft	88	v. Powell	557
Pomroy v. Lyman	46	v. Sacramento	356
v. Parmlee	125	Prichard v. Campbell	8, 253, 269
Pontchartrain, &c. v. Paulding	403	Prideaux v. Morrice	224
Pouton v. Wilmington	469	Priesley v. Fowler	457
Pool v. Perdue	122	Priester v. Augley	413
Poole v. Canning	503	Prince v. Puckett	4
Poor v. Gibson	10	Princeton v. Gibson	158
v. Oakman	39	Pritchard v. La Crosse, &c.	339
Pope v. Hall	539	Proctor v. Andover	389
v. Hart	74	v. Burdet	66
Porch v. Frees	88, 99	Proffitt v. Henderson	87
Porcher v. North	551	Proilet v. Hall	539
Porter v. Foster	34	Proprietors, &c. v. Boulton	268
v. Hildebrand	592	Protzman v. Indianapolis, &c.	302
v. Hooper	231	Providence v. Clapp	366
v. Ruckman	488	Pryne v. Westfall	139
v. Thomas	447	Pugh v. Griffith	19, 21
Portland v. Richardson	381	Pullen v. Bell	58
Postlethwaite v. Parkes	515	Pulsifer v. Shepard	526
Potter v. Bunnell	300	Purcell v. Southern Expr. Co.	577
v. Cromwell	49	Purrrington v. Loring	147
v. Lansing	215	Purves v. Moltz	39
v. Merchants', &c.	283	Purvis v. Coleman	415, 539
v. Seymour	433, 434	Putney v. Lapham	240
Powell v. Bagg	8	Putt v. Roster	4
v. Deveney	416	Pynchon v. Stearns	91
v. Governor	191		
v. Hoyland	448		
v. Layton	262		
v. Mills	546, 567, 591		
v. Olds	29		
Power v. Harrison	22		
Powers v. Sawyer	265		
Powles v. Hider	423		
Powys v. Blagrove	93		

Q.

Quarman v. Burnett	424
Quiggin v. Duff	530
Quim v. Ophir	483
Quimby v. Vanderbilt	586
Quincy v. Newcomb	273
v. Taylor	297

R.		Ready v. Steamboat, &c.	517
R. & W., &c. v. Bank, &c.	72	Ream v. Rank	67
Radcliff v. Brooklyn	387	Receivers v. Neilson	274
v. The Mayor, &c.	295	Rector, &c. v. Buckhart	201
Rader v. Snyder	479	Redfield v. Frear	229
Radley v. Rudge	66	Redington v. Chase	216
Ragsdale v. Williams	51	Redman v. State	8
Railroad Co. v. Aspell	334	v. Taylor	557, 564
v. Barrow	295	Redmond v. Liverpool	481
v. Gries	250	Reece v. Rigby	124, 404
v. Harris	322	Reed v. Conway	235
v. Kidd	42	v. Howard	23
v. Reeves	574	v. Legg	297, 300
v. Skinner	341	v. Louisville	184
v. Yeiser	299	v. Neale	362, 370
Raine v. Alderson	611	v. Northfield	4
Raithel v. Dezetter	48	v. Peoria, &c.	549, 556
Ralston v. Oursler	190	v. Spaulding	563
Ramaley v. Leland	537	v. United States	424, 434
Ramsden v. Boston	328	Reedie v. London, &c.	479
Ramsey v. Gould	401	Reeve v. Palmer	297
Ranch v. Lloyd	466	Regina v. Eastern, &c.	329
Rand v. Oxford	36	v. Frere	224
Randall v. Brigham	493	v. Heathcote	480
v. Eastern	367	Reilly v. Cavanaugh	455
v. Smith	219	Reimers v. Ridner	368
Randelson v. Murray	423, 424	Reinhard v. New York	147
Randolph v. State	145	Remmett v. Lawrence	211, 213
Rank v. Rank	71, 240	Renick v. Orser	581
Rankin v. Craft	527	Reno v. Hogan	236
Ransom v. Halcott	164	Renton v. Chaplain	336, 353
Ransome v. Eastern, &c.	355	Renwick v. New York	361, 369
Raphael v. Pickford	557	Requa v. Rochester	267
Rapho v. Moore	384	Revett v. Bowne	115, 491
Rapson v. Cubitt	431	Revill v. Pettit	89
Razor v. Qualls	13, 316, 319, 436	Rex v. Inhabitants	128
Ratchliffe v. Burton	20	v. Sheriff	288
Ratliff v. Huntly	17	Reynolds v. Kenyon	70
Ravenscroft v. Eyles	212	v. Shuler	609
Rawley v. Hooker	161	v. Williams	317
Rawlins v. Rounds	502	Rice v. Boston	123, 478
Rawson v. Dole	215	v. Commonwealth	363, 377
v. Pennsylvania	322	v. Montpelier	58, 98
Ray v. Ayers	610	Rich v. Baker	186
Raymond v. Bolles	110	v. Bell	413
v. Howland	473	v. Jackway	570
v. Lowell	369, 376, 378	v. Lambert	359
Raynor v. Whicher	184	Richards v. Enfield	591
Rhoads v. Woods	163	v. London, &c.	12
Rea v. Sheward	15	v. Peake	31
v. Tucker	517, 520	Richardson v. Atkinson	389, 392
Read v. Amidon	535, 542	v. Brooklyn	34
v. Chelmsford	385	v. Dingle	249
v. Fairbanks	69	v. Emerson	560
v. Markle	157	v. Goddard	445
v. Spaulding	572, 573	v. Kimball	2
Readhead v. The Midland	589	v. Milburn	353
		v. New York	330
		v. North	

Richardson v. R.R. Co.	330	Rochester, &c. v. City, &c.	387
v. Reed	157	v. Clarke	123
v. Richardson	508	Rockwell v. Proctor	526, 588
v. State	507	Rockwood v. Allen	184
v. Vermont, &c.	295	Roddy v. Cox	227
Richmond v. Long	393, 444	Rodermund v. Clark	227
v. Nicholson	55	Rodgers v. Grothe	599
v. Robinson	289	v. Rodgers	99, 160, 178
v. Sacramento, &c.	344	Rodwell v. Williams	368
v. Tallmadge	215	Roe v. Birkenhead, &c.	326
v. Willis	201	Rogers v. Fairfield	148
Richtmeyer v. Remsen	213	v. Huie	40, 447
Ricketts v. Baltimore	563	v. Jones	116
Riddle v. Driver	58	v. Long	554, 555
v. Proprietors	273	v. Newburyport, &c.	340
Rigaut v. Gallisard	507	v. Parham	473
Riggs v. Thatcher	132, 215	v. Pitman	45
Riley v. Boston, &c.	58	v. Rogers	508
v. Denny	11	v. Silas	190
v. Horne	584	v. Smith	498
v. Martin	45	v. Sumner	194, 195
v. Whittaker	210	v. Weir	56, 448
Rinehey v. Stryker	136	Rolin v. Steward	288
Rindge v. Coleraine	602	Rolke v. Chicago	313
Ringgold v. Haven	552	Roll v. Black	51
Ringham v. Clements	68	v. City	356
Ringo v. Field	40	Rollins v. Varney	10
Ripley v. Dolbiér	32	Rome, &c. v. Sullivan	561, 562, 564, 575
v. New Jersey	327	Romig v. Romig	63
Ritter v. Merseles	193	Rooke v. Midland, &c.	319, 348
v. Scannel	141, 148	Root v. French	80, 81
Rivard v. Gardner	145	v. Great	322
Rivenburgh v. Henness	119	v. Wagner	192
Roadcap v. Sipe	504	Rooth v. North	569
Robbins v. Mount	523	v. Wilson	602
v. Packard	62	Rose v. Green	210
v. Sawyer	3	v. Oliver	270
Roberts v. Bredell	66	Rosewell v. Prior	436
v. Connelly	514	Ross v. Boston	352
v. Dame	232	v. Cave	190
v. Prosser	203	v. Gerrish	484
v. Randel	79	v. Johnson	574
v. Wentworth	173	v. Madison	388
Robertson v. New York, &c.	597	v. Philbrick	176
Robinson v. Austin	575	v. Weber	180
v. Baker	600	Roston v. Morris	227
v. Bealle	441	Rotch v. Haines	33
v. Ensign	150, 180	Roth v. Wells	161, 200
v. Flanders	207	Rothe v. Milwaukee	335
v. Frost	68	Roulston v. McClelland	527
v. Gardner	527	Rounds v. Mansfield	401
v. Harrison	133	Roussin v. Benton	611
v. Hartridge	28, 50	Rowe v. Pickford	564
v. Holt	182	v. Smith	503
v. Illinois	452	v. Williams	124
v. London	577	Rowell v. Keefe	563
v. Mansfield	168	v. Lowell	376
v. Skipworth	28	v. Rowell	367
v. Smith	402	Rowland v. Cooper	166

Rowland <i>v.</i> Miln	557	Samyn <i>v.</i> McClosky	427
<i>v.</i> Rowland	6	Sanborn <i>v.</i> Carleton	150
<i>v.</i> Veale	142	<i>v.</i> Fellows	125
Rowley <i>v.</i> Horne	585	<i>v.</i> Hamilton	187
Rubottom <i>v.</i> McClure	12, 16	Sanders <i>v.</i> Dowell	128
Rucker <i>v.</i> McNeely	7, 8	<i>v.</i> Reed	617
Ruckman <i>v.</i> Atwater	97	<i>v.</i> State	357
Rudy <i>v.</i> Commonwealth	197	<i>v.</i> Vance	618
Rue <i>v.</i> Perry	138	Sanderson <i>v.</i> Edwards	162
Runyon <i>v.</i> Caldwell	529	<i>v.</i> Haverstick	57
Rush <i>v.</i> Baker	255	<i>v.</i> Rutland	212
Rushworth <i>v.</i> Taylor	51	Sandford <i>v.</i> Halsey	78
Russ <i>v.</i> Steamboat	544	<i>v.</i> Handy	78, 441
Russel <i>v.</i> Palmer	483	Sandon <i>v.</i> Jervis	20
Russell <i>v.</i> Burlington	386	Sanford <i>v.</i> Augusta	380, 500
<i>v.</i> Fabyan	609	<i>v.</i> Boring	132
<i>v.</i> Hankey	451	<i>v.</i> Eighth Ave., &c.	327, 598
<i>v.</i> Hudson, &c.	464, 470	<i>v.</i> Pond	141
<i>v.</i> Livingston	542, 557	<i>v.</i> Wiggins	137
<i>v.</i> Marks	233	Sargant <i>v.</i> Gile	40
<i>v.</i> Runneman	415	Sargent <i>v.</i> ———	516
<i>v.</i> Tomlinson, &c.	268	<i>v.</i> Birchard	552
<i>v.</i> Turner	215	<i>v.</i> Mathewson	522
Ryalls <i>v.</i> Regina	102	Sarjeant <i>v.</i> Blunt	39
Ryan <i>v.</i> Brant	37	Sarles <i>v.</i> Sarles	88, 91, 92, 95, 99
<i>v.</i> Cumberland, &c.	464, 466	Sarting <i>v.</i> Saling	251
Ryerson <i>v.</i> Abington	374	Sasseen <i>v.</i> Clark	533, 535, 537
		Satherthwaite <i>v.</i> Duerst	515, 517
		Saunders <i>v.</i> Columbus	162
		<i>v.</i> Darling	209
		<i>v.</i> Hatterman	81
		Savage <i>v.</i> Bangor	366, 371
		<i>v.</i> Walthew	451
		Savannah <i>v.</i> Cullens	392
		Savill <i>v.</i> Kirby	474
		Sawyer <i>v.</i> Corse	150
		<i>v.</i> Dulany	587
		<i>v.</i> Merrill	182, 267
		<i>v.</i> Northfield	383
		<i>v.</i> Rutland, &c.	467
		<i>v.</i> Ryan	10
		<i>v.</i> Vermont	341, 346
		Scaggs <i>v.</i> Baltimore, &c.	341
		Scales <i>v.</i> Chattahoochie	357
		Scammon <i>v.</i> Chicago	432
		Scandover <i>v.</i> Warne	128
		Scarborough <i>v.</i> Thornton	216
		Schaeffer <i>v.</i> Fithian	505
		Scheettgen <i>v.</i> Wilson	101
		Schermerhorn <i>v.</i> Buell	97
		Schierhold <i>v.</i> North	303
		Schinotti <i>v.</i> Bumstead	224
		Schley <i>v.</i> Lyon	69
		Scholes <i>v.</i> Ackerland	560
		School <i>v.</i> Boston	580
		<i>v.</i> First	285
		Schoraieinan <i>v.</i> Palmer	510
		Schroder <i>v.</i> Elders	111
		Schræder <i>v.</i> Hudson, &c.	557, 563

Schultz v. Frank	136	Sharp v. Grey	588
Schular v. Hudson, &c.	426	v. Nesmith	42
Schuneman v. Diblee	223	Sharrod v. London, &c.	409
Schwartz v. Gilmore	436	Shattock v. Carden	148
v. Hudson	336, 337	Shaw v. Arden	487
Schwerin v. McKie	564, 565	v. Baldwin	150
Scidmore v. Smith	477	v. Berry	533
Scott v. Bay	608	v. Boston, &c.	293
v. Boston	561	v. Coffin	524
v. Crews	285	v. Davis	125, 185, 544
v. Depeyster	402, 403	v. Peckett	220
v. Godwin	239	Shedd v. Troy	325
v. Jester	600	Sheldon v. Hudson	352
v. Manchester	437	v. Paine	150
v. Mayor, &c.	415, 425	v. Payne	134, 196
v. Perkins	245	Shelton v. London	353
v. Print Works	164	Shenk v. Philadelphia	557
v. Rogers	453	Shepard v. Buffalo	346
v. Watson	524	Shepardson v. Colerain	366
v. Whittemore	167	Shepherd v. Chelsea	376
Scotthorn v. South, &c.	319	Sheppard v. McQuilkin	243
Scranton v. Baxter	528	v. Melloy	240
Scriber v. Masten	28	v. Shelton	236
Scruggs v. Davis	34	Shepperd v. Johnson	69
Scudder v. Woodbridge	468	Sherman v. Ballou	499
Sea v. Carpenter	455	v. Brantley	203
Seals v. Cummings	63	v. Matthews	66
Seaman v. Luce	138	v. Rochester, &c.	464
v. New York	387	v. Smith	271
Seamen v. Patten	225	v. The Rochester, &c.	275, 463
Sears v. Eastern	329	v. Way	27
Seaton v. Son	231	Sherrill v. Shuford	132
Seaver v. Boston, &c.	324, 461, 465	Sherwood v. Houston	170
v. Pierce	135, 152	v. Titman	508, 509
Second Cong. Society v. Howard	5	Shewel v. Fell	146
Sedgworth v. Overend	239	Shiels v. Stark	234
Seeley v. Brown	209	Shinkle v. Covington	392
Segar v. Kirkley	6	Shipley v. Baltimore	296
Seidel v. Peschkaw	202	v. Fifty	608
Self v. Dunn	544	Shipman v. Horton	525
Sessions v. Newport	366	Shippen v. Curry	143
v. Western	557	Shipwick v. Blanchard	44
Settle v. Alison	269	Shirley v. Billings	544
Severin v. Eddy	380, 405	Shoecraft v. Bailey	535, 542
Sewall v. Lancaster, &c.	63	Shoemaker v. Kingsbury	322
v. Mattoon	165	Short v. Wilson	96
Seward v. Chicago	346	Shotwell v. Wendover	69, 72
v. Heflin	64	Shreeve v. Adams	450
Sewell v. Harrington	199	Shriver v. Harbaugh	171
Sexton v. Nevers	186, 200	Shufford v. Cline	124
Seymour v. Cook	538	Shumway v. Carpenter	167
v. Maddox	457	v. Rutter	137
Shackelford v. Planters	172	Shute v. McRae	141
Shackford v. Goodwin	208	Sibley v. Aldrich	533, 534
Shaddock v. Clifton	501	v. Hulbert	84
Shadgett v. Clipson	128	Sika v. Chicago	341
Shafer v. Guest	536	Siler v. McKee	214
v. Mamma	206	Simmons v. Bradford	209, 482
Sharp v. Emmet	284	v. Lillystone	29, 43

Simons v. Great, &c.	584	Smith v. New Haven	551
v. Monier	407, 414, 423	v. New York, &c.	470, 474, 526, 549, 552, 593
Simpkins v. Low	455	v. North	580
v. Rogers	58	v. Oriell	235
Simpson v. Hart	270	v. Pike	194
v. McCaffrey	23	v. Pocock	484, 485
v. Perry	269	v. Poor	402
v. Savage	610	v. Prattville, &c.	402
v. Watrus	172	v. Reid	525
Sims v. Macon, &c.	597	v. Richards	512
Singleton v. Hilliard	571	v. Royston	12
Sinrain v. Pittsburgh	346	v. St. Joseph	374
Sir George Downing's Case	495	v. Seward	549
Sisco v. Cheeney	504	v. Sharpe	96
Sisson v. Cleveland, &c.	329	v. Shaw	131
Sissons v. Dixon	552	v. Shirley	24
Sitgreaves v. Farmers', &c.	292	v. Singleton	262
Skelley v. Kahn	528	v. Smith	371
Skelton v. London	334	v. Stokes	235
Skinner v. Chicago, &c.	558	v. Taylor	505
v. Flint	80	v. The State	123
v. London, &c.	348	v. Tooke	141
v. Upshaw	599	v. Tracy	440
Slade v. Washburn	248	v. Turnley	187
Slattery v. Toledo, &c.	349, 463	v. Van Olinda	46
Slaughter v. Barnes	154	v. Way	492
Sleade v. Payne	557	v. Webster	410
Sleat v. Fagg	584	v. Welch	188
Slocum v. Fairchild	581, 583	v. Wendell	383
Slocumb v. Washington	529	v. Whitman	558, 572
Smallcomb v. Cross	144	Smout v. Ilbery	440
Smith v. Alison	508	Smyth v. Tankersley	187, 228
v. Andrews	81	Snead v. Watkins	542
v. Birmingham	274	Snell v. Allen	178
v. Bodfish	178, 183	Snider v. Myers	9
v. Boston, &c.	323	Snively v. Commonwealth	199
v. Boucher	108	Snodgrass v. Bradley	409
v. Bowker	128	Snow v. Housatonic, &c.	349
v. Church	165, 178	Snydacker v. Brosse	155
v. Colcord	543	Snyder v. Penn.	300
v. Commonwealth	210	v. Snyder	503
v. Corbiere	203	Solomon v. Waas	205
v. Dedham	358	Sommerville v. Mirehouse	112
v. Emerson	146, 187	South v. Columbia	300
v. Felt	243	v. Maryland	124
v. First	527	v. Suffolk	281
v. Frank	80	South C. Railroad v. Bradford	555
v. Grove	65	South-eastern v. European	347
v. Guild	129	Southern v. Caperton	552
v. Hall	204	v. Crook	549, 578, 580
v. Hickson	499	v. Everett	586
v. Hurd	402	v. Hixon	278, 280
v. Knapp	201	v. Kendrick	589
v. Lawrence	420	v. McVeigh	526, 549
v. Leavitts	130, 191	v. Moon	567
v. Marvin	36	Southwick v. Estes	416
v. Meegan	530	Southwood v. Myers	536
v. Miles	126	v. Newby	545, 554
v. Nashua, &c.	317		

Southwood v. Shea	562	State v. Campbell	120, 328
v. Thornton	563	v. Carroll	123
v. Womack	549, 566	v. Cleaves	506
Southworth v. Old	337, 371	v. Copp	117
v. Van Pelt	613	v. Crow	126
Sowell v. Champion	492	v. Donaldson	261
Spade v. Hudson, &c.	318	v. Downer	137
Spafford v. Goodell	213, 215	v. Dunn	404
Spaids v. New York	566	v. Elrod	140
Spangler v. Eicholtz	530	v. Falls	213
Sparhawk v. Bartlett	202, 209	v. Farrar	522
v. Salem	368	v. Freeman	131
Sparks v. Purdy	41	v. Halford	215
Spaulding v. Barnes	619	v. Hamilton	126, 214
Spear v. Cummings	523	v. Hart	218
v. Cutler	99	v. Hartwell	110
Speed v. Heisin	29	v. Jones	122
Spence v. Chicago	345	v. Kirk	479
v. Mitchell	54	v. Lafferty	206
v. Tuggle	127, 201	v. Laies	185
Spencer v. Long	184	v. Latham	141
v. Pilcher	33	v. Lawson	148
v. Weatherly	6	v. Leicester	389
Spering v. Smith	402	v. London	300
Spice v. Steinruck	201	v. Lowrance	200
Spies v. Accessory, &c.	499	v. McClure	213
Spooner v. Brooklyn, &c.	597	v. McNally	130
v. Mattoon	527	v. Mann	194
Sprague v. Birchard	127	v. Marsh	226
v. McKinzie	72	v. Marvin	507
Sprights v. Hawley	29	v. Mayberry	256
Springfield v. Le Claire	366	v. Medbury	507
Sprong v. Boston	330	v. Merritt	242
Squibb v. Hole	131	v. Miller	137
Squire v. New York	541	v. Moore	150
Staats v. Freeman	98	v. Morgan	127
Stackhouse v. Lafayette	380	v. Morris, &c.	275
Stadhecker v. Combs	549	v. Nelson	167
Stafford v. Newsom	82	v. Parchman	141
Stanley v. Drinkwater	142	v. Patten	27
v. Gaylord	600	v. Pearman	5
Stanton v. Metropolitan	338	v. Phinney	139, 212
Staples v. Bradley	235	v. Romer	186
Starbird v. Frankfort	500	v. Ross	327
Starnes v. Quin	240, 241	v. Rye	359
Starr v. Bennett	145	v. Sartor	362
v. Jackson	612	v. Sharp	171
Start v. Sherwin	178	v. Shean	518
State v. Andrews	240	v. Sherwood	224
v. Baden	215	v. Sutherland	518
v. Baker	110	v. Sypher	477
v. Baltimore	330	v. Tolan	122
v. Bangor	357	v. Ward	207
v. Barker	161	v. Wetherall	207
v. Bierce	511	v. Woodward	14, 17
v. Brown	207	v. Yeaton	17
v. Burlington	389	v. Youmans	141
v. Burnham	256	Steamboat, &c. v. Chapman	561
v. Byrd	193	v. King	330, 571

Steamboat, &c. v. Kraft	599	Stone v. Clough	60
Stearns v. Atlantic, &c.	425	v. Codman	427
v. Marsh	70	v. Dana	23, 146
v. Old Colony, &c.	339, 342	v. Dickinson	243
Stebbins v. Leowolf	455	v. Hubbardston	375
Stedman v. Crane	20	v. Lingwood	46, 71
v. Perkins	172	v. Waggoner	27
v. Southbridge	362	v. Waitt	563
v. Western	584	v. Western	407
Steel v. South-eastern, &c.	312, 419	v. Woods	215
Steele v. Dunham	102	Story v. Norwich, &c.	74
v. Smith	413	Stott v. Alexander	65
Steere v. Field	210, 214	Stoughton v. Porter	381
Stein v. Burden	388	Stout v. Oliver	74
v. Valkenhuysen	204	v. Woody	475
Stephen v. Smith	327	Strader v. Mullane	74
Stephens v. Frazier	136	Straecker v. Alabama	296
v. Wilkins	125	Strickfaden v. Zipprick	133
Stephenson v. Hart	574	Strickland v. Barrett	616
v. Price	526	Strohl v. Levan	523
Stevens v. Armstrong	423	Strohn v. Detroit	567, 585
v. Boston, &c.	600	Strouse v. Becker	187
v. Boxford	375	Stryker v. Merseles	133
v. Eames	169	Stuart v. Machias	374
v. Elwall	29, 437	v. Whittaker	143
v. Hathorne	407	Stucke v. Milwaukee, &c.	293, 339,
v. Hyde	80		343
v. Low	69, 70, 72	Sturdevant v. Tuttle	202
v. Rowe	141, 210	Sturges v. Keith	69
v. Walker	480	Sturgis v. Warren	3
Stevenson v. Belknap	512	Stuyvesant v. Tompkins	609
v. Judy	190	Sudbury, &c. v. Middlesex, &c.	397
Stewart v. Bremer	544	Suffolk, &c. v. Lowell, &c.	292
v. Burlington	346	Sugg v. Memphis	595
v. English	74	Sullivan v. Jones	112, 255
v. Harvard	471, 607	v. Mississippi, &c.	469
v. Houston	186	v. Thompson	549
v. Levy	272	Sunbury, &c. v. Hummell	299
v. London	594	Sutliff v. Gilbert	266
v. Lord	591	Sutton v. Allison	148
v. Martin	130, 137	v. Board	393
v. New Orleans	391	v. Clark	243, 398
v. Parsons	541	v. Huffman	512, 514
v. Ray	130	Suydam v. Grand, &c.	331
v. Simpson	477	v. Keys	115, 128
v. Stringer	145	Swann v. Brown	531
v. Wells	157	Swanzy v. Chace	380
Stockbridge v. Cone	443	Swarthout v. New Jersey	547
Stockwell v. Byrne	161, 192	Sweeny v. Old Colony	353
Stoddard v. Long Island, &c.	549, 576,	Sweet v. Barney	559, 564
	580	Swetland v. Boston	554, 567
v. Tarbell	130	Swift v. Wylie	36, 205
Stokes v. Saltonstall	589	Swigert v. Graham	529
Stone v. Augusta	101, 388	Swindler v. Hilliard	576
v. Bank, &c.	285	Swinely v. Fahnstock	158
v. Carter	205	Swinfen v. Lord Chelmsford	493
v. Cartwright	435, 436, 443	Swinney v. Johnson	129
v. Chambers	155	Sykes v. Bates	408
v. Cheshire, &c.	425	v. Pawlet	359

Symonds v. Atkinson	60, 63	Thames, &c. v. Housatonic, &c.	409,
v. Harris	232		410
Syred v. Carruthers	531	Thatcher v. The Bank	281
		Thayer v. Barney	74
		v. Boston	275, 387
		v. Hutchinson	163
		v. St. Louis, &c.	314, 324, 339,
			341, 349
		v. Turner	83
T.		The Bark (Case of)	571
Taaffe v. Downs	102	The City v. ———	584
Talbott v. Spear	66	The Governor v. Baker	147
Talcott v. Rosenberg	160	v. Bancroft	147
Tallahasse, &c. v. Macon	529	v. Campbell	133
Tallmadge v. Grannis	498	v. Gibson	148
Tallman v. Turck	36, 245	The Ionic v. ———	592
Talmadge v. Rensselaer, &c.	341	The King v. Lyme Regis	142
Tapley v. Forbes	37	The Marshalsea (Case of)	105
Tarbell v. Central	322	The Montgomery, &c. v. The Al-	
Tarbox v. Eastern, &c.	552	bany, &c.	290
Tardos v. Tonlon	552	The Newark (Case of)	569
Tarleton v. McGawley	17	The President v. Wright	274
Tarlton v. Fisher	127	The White, &c. v. Comegys	100
Tarns v. Lewis	256	Thickstun v. Howard	538
Tarrant v. Webb	468	Thomas v. Boston, &c.	564
Tate v. Ohio	17	v. Crofut	58, 98
Tatum v. Morris	157	v. Georgia	355
Taylor v. Brown	150	v. Steele	27
v. Commonwealth	215	v. Sternheimer	65
v. Day	588	v. Western	374
v. Fleet	82	v. Womack	406
v. Jaques	36	Thomson v. Sixpenny, &c.	54
v. Jones	271	Thompson v. Baltimore	177
v. Knapp	501	v. Bank, &c.	284, 287
v. Manderson	200	v. Bell	287
v. Monnot	535, 575	v. Bridgewater	378
v. Morgan	69	v. Brown	195
v. Nichols	167	v. Currier	220
v. Pope	37	v. Fargo	549
v. Rhodes	45	v. Haskell	148
v. Seymour	172	v. Marsh	163
v. True	230	v. Rose	45
v. Wells	67	v. Ross	514
v. Winer	190	v. Rowe	56, 79
v. ———	575	v. Trail	54
Teall v. Felton	47	Thorne v. Deas	528
v. Sears	564	Thornton v. Springer	363
Tefft v. Ashbaugh	126	v. Winter	147
Temperance v. Giles	368	v. York, &c.	232
Tenbrook v. The City	276	Thorogood v. Robinson	42
Ten Eyck v. Harris	557	Thorp v. Burling	447
Tennessee v. Adams	295, 300	Thrall v. Lathrop	34
Terhune v. Dever	75	Threadgood v. Litogot	518
Terrail v. Tinney	120	Thurman v. Wells	555, 567
Terre Haute, &c. v. Smith	341	v. Wild	407
Terrill v. Cecil	198	Tiffany v. Johnson	147
Terry v. Huntington	105, 119	v. St. John	193
Terwilliger v. Wands	499	Tillman v. Shackleton	500
v. Wheeler	138	Tillotson v. Hudson, &c.	312
Tetus v. Northbridge	367		
Tewkesbury, &c. v. Diston	78		

Tillotson v. Wolcott	187	Trowbridge v. Forepaugh	381
Tinker v. Russell	374, 387	Trowell v. Youmans	574
Tinkham v. Heyworth	283	Troy, &c. v. Northern, &c.	299
Tinkler v. Poole	46	True v. McGilvery	450
Tinney v. Boston	349, 352, 353	Truettell v. Barandon	61
Tinsman v. Belvidere, &c.	313, 394,	Truex v. Erie	332
	611	Trull v. Howland	128
Tisdale v. Norton	378	Trumbull v. Nicholson	483
Titchburne v. White	579	Tryon v. Mansir	184
Titcomb v. Fitchburg	355	Tucker v. Bond	186
Titworth v. Winnegar	564, 565	v. Campbell	237
Tobey v. Leonard	152	v. Chaplin	346
v. Smith	503	v. Henniker	375
v. Webster	609	v. Malloy	126
Tobin v. Addison	126	v. Newman	611
v. Portland	353	v. Wright	71
Tod v. Benedict	450	Tuckerman v. Stephens	562
Todd v. Bradford	153	Tuckwell v. Lambert	82, 473
v. Crookshanks	60	Tudor v. Lewis	527
v. Old, &c.	331	Tuite v. Wakelee	558
Tolano v. National	5	Tuller v. Talbot	588
Toledo, &c. v. Boohless	340	Tullis v. Brawley	146, 148
v. Daniels	342	Tulloch v. Worrall	231
v. Ferguson	338	Tultis v. Orthmeim	185
v. Fowler	342	Turner v. Beatty	11
v. Hammond	592	v. Estes	510
v. Miller	345	v. Meymott	606
v. Rumbold	350	v. Norris	181
v. Sweeney	345	v. Phillips	495
v. Thomas	338, 341	v. St. John	479
v. Weaver	341	v. Sheffield, &c.	294, 298
Tompkins v. The Floyd, &c.	273	v. Waldo	605
Tooker v. Governor	599	Turton v. Dufief	452
Tower v. Utica, &c.	591, 595	v. Turton	508
Towle v. Lovet	63	Tuttle v. Buck	187
Towne v. Wiley	524	v. Wilson	212
Townsend v. Hill	529	Twinam v. Swart	187
v. Newall	162	Twitchell v. Commonwealth	256
v. Olin	146	v. Shaw	128
v. Stoddard	202	Tyler v. Alford	112
v. Susquehannah	273	v. Smith	146
Tozer v. Child	218	v. Taylor	228
Tracy v. Griffin	203	v. Ulmer	154
v. Troy	345	Tysen v. Moore	569
Trafton v. United States	450		
Trask v. Martin	282		
v. Payne	206		
Travis v. Barger	517		
Traylor v. Horrall	50		
Treadwell v. Davis	601		
Treaner v. Campbell	252		
Treiber v. Burrows	537		
Trevillian v. Andrew	609		
Tribble v. Frame	11, 12		
Trice v. Hannibal	346		
Trieber v. Blocher	135		
Tripp v. Lyman	366		
v. Riley	240		
Trowbridge v. Chapin	554		

V.

Vai v. Weld	607
Vale v. Bliss	381
Van Arsdale v. Dixon	502
Van Bibber v. Frazier	231
Van Brunt v. Schenck	411
Van Buskirk v. Purminton	600
Vance v. Erie	275
v. Throckmorton	534
v. Vanarsdale	166, 191
Vanderbilt v. Richmond, &c.	276, 411, 412
Vane v. Cobbold	81
v. Lord Barnard	88
Van Orman v. Phelps	11
Van Pelt v. McGraw	613
Van Syckel v. Emery	94
Van Tassel v. Van Tassel	192, 198
Van Vacter v. McKillip	506, 508
Van Winkle v. Adams	550
v. South	552
Van Wyck v. Alliger	90
Veazie v. Mayo	300
v. Penobscot, &c.	300, 381
Vedder v. Fellows	319
Venable v. Curd	122
Vermont v. Fitchburg	322
Verral v. Robinson	56
Verrall v. Grand, &c.	540
Verrill v. Minot	375, 380
Vicksburg, &c. v. McKean	277
Viele v. Goss	84
Vilas v. Barker	211
Vincennes v. Richards	389
Vinton v. Middlesex	304
v. Weaver	157
Virginia, &c. v. Sanger	547, 587
Vogelsong v. Beltzhoover	186
Von Bruck v. Peyser	86
Von Hurter v. Spengeman	455
Vooght v. Winch	477
Voorhees v. Earl	79
Vosburgh v. Moak	244
Vossel v. Cole	515, 516, 517

W.

W. & A., &c. v. Kelly	553
Waddell v. Cook	236
Wade v. Thayer	410
v. Wheeler	554
Wadhams v. Lackawanna, &c.	296
Wadleigh v. Janvrin	3
Wagenblast v. McKean	34, 55
Wagener v. Bill	505
Wagner v. Lathers	201

Wait v. Richardson	232
Waite v. Woodward	219
Wakefield v. Fairman	173, 227
v. Lithgow	195
Walcott v. Keith	156
Walden v. Dudley	221
Waldman v. Broder	236
Waldron v. Haupt	180
Walker v. Bolling	463
v. Commonwealth	478
v. Cronin	475
v. Davis	141
v. Fenner	502
v. Goodman	482
v. Lovell	188
v. Swasey	14
v. Westfield	375
v. Woods	189
v. York, &c.	577
Walkins v. New York	297
Wall v. Hinds	92
v. McNamara	222
v. State	213
v. Trumbull	114
Wallace v. Canaday	532
v. Clayton	569
v. Holly	171
v. Morgan	411
v. Morss	524
v. Sanders	566
Walling v. Potter	535
Wallis v. Osteen	38
v. Truesdell	162, 173, 176
Walrond v. Van Moses	8
Walsby v. Anley	261
Walsh v. Adams	235
Walter v. Bennett	452
v. Post	603
v. Wicomoco	257
Waltham v. Kemper	357
Walworth v. Readsboro'	192
Wanless v. N. E.	337
Warburton v. Great Western, &c.	471
Ward v. Central	330
v. Jefferson	369
v. New York	564
v. Smith	67
Warden v. Bailey	263
Ware v. Brown	225
v. Gay	589
v. St. Paul	434
v. Ware	95
Warfield v. Campbell	490
v. Walter	17
Warmoll v. Young	137
Warner v. Burlington	324
v. Erie	471
v. Shed	125
v. Stockwell	128

Warner v. Western	579	Welch v. Whittemore	618
Warnemacher v. Davis	203	Weld v. Bartlett	159, 210
Warren v. Arthur	605	v. Chadbourne	165, 171
v. Cochran	189	v. Oliver	228, 229
v. Fitchburg, &c.	332	Weldon v. Harlem, &c.	409
v. Hawkins	478	Wellington v. Norwich	322
v. Leland	180	v. Small	259
v. Milliken	27	v. Wentworth	71
v. Parker	284	Wellman v. English	135
v. State	300	Wells v. Jackson	11
v. Suffolk, &c.	285	v. New York, &c.	587
Washborn v. Black	2	v. Somerset, &c.	296, 299
Washburn v. Blake	451	v. Steam, &c.	549
v. Jones	537	v. Wilmington, &c.	556
v. Nashville	335, 348, 471	Welsh v. Lawrence	408
Washington, &c. v. Bacher	280	v. Pittsburg, &c.	580
Wasson v. Canfield	120	Wentworth v. Blanchard	221
Waterbury v. Westervelt	150, 151, 406	v. McDuffie	33
Waterhouse v. Bird	163	Wertheimer v. Howard	111
Waterman v. Merrill	141	Wesson v. Seaboard, &c.	408
Waters v. Monarch, &c.	601	West v. Brockport	363
v. Moss	344	v. Cooper	131, 192
Watkins v. Great, &c.	297, 298	v. Louisville	312
Watson v. Bennett	274, 290	v. Mason	380
v. Cross	542	v. Miles	322
v. Muirhead	487	v. Raymond	478
Watt v. Potter	69	v. Shockley	136, 157
Watter v. Palmer	141	v. Smallwood	131
Watts v. Boston	555	v. Trenton	28
v. Saxon	567	Westbury v. Aberdein	81
Way v. Townsend	112	Westcott v. Wheeler	85
Wayne v. Benoit	122	Western, &c. v. Hill	299
Weare v. Fitchburg	361	v. Newhall	552, 558,
Weaver v. Commonwealth	212		575, 593
v. Skinker	198	v. Nolan	219
Webb v. Beavan	15	v. Reed	297
v. Mann	228	Westfall v. Jones	75
v. Steele	169	Weston v. Ames	196
Webber v. Davis	28	v. Dorr	160, 181
v. Great	563	Wetherell v. Hughes	179
v. Merrill	239	Wetmore v. Campbell	220
Weber v. Henry	136	Wetzell v. Waters	254
Webster v. Heylman	59	Weyant v. New York, &c.	425
v. Peck	161	Wheatley v. Patrick	413
Weed v. Barney	564	Wheelden v. Lowell	15
v. Panama, &c.	410	Wheeler v. Hambricht	154
v. Saratoga, &c.	319	v. Pettes	215
Weedon v. Timbrell	508, 509	v. Rowell	13
Weeks v. Goode	55	v. San Francisco	322
v. Shirley	380	v. Westport	363, 364
Weger v. Pennsylvania	464	v. Wheeler	228
Wehle v. Butler	45	v. Willard	195, 478
Weidensaul v. Reynolds	148	Wheelock v. Archer	158
Weightman v. Washington	387, 388	v. Wheelwright	33
Weinberg v. Conover	46	Wheelwright v. Depeyster	239
Weisenberg v. Appleton	368, 370, 374,	Whidden v. Coleman	503
	380	v. Seelye	57
Weisenger v. Taylor	537	Whipple v. Gilpatrick	33
Welch v. Durand	1	v. Kent	126

Whipple v. Thayer	182	Wilcox v. Iowa	75
Whitaker v. Sumner	182	v. Parmelee	549
Whitbeck v. Dubuque	346	v. Rome	336
White v. Bascom	238, 553	Wilde v. New Orleans	387
v. Bond	356	v. Waters	51, 58
v. Boston, &c.	297	Wilderman v. Sandusky	266
v. Brooks	228	Wilds v. Blanchard	184
v. Campbell	518	v. The Hudson, &c.	302, 331
v. Goff	484	Wiles v. Brown	214
v. Graham	66	Wilkins v. Earle	539, 541
v. Great Western, &c.	556	Wilkinson v. Coverdale	528
v. Harlow	487	v. Stewart	401
v. McClure	299	v. Wait	184
v. Madison	199, 443	Willard v. Baker	3
v. Morton	240	v. Bridge	531
v. Mosely	9	v. Newbury	357
v. Nellis	475, 511	v. Reinhardt	533, 536, 542
v. Phelps	28, 32	v. Warren	11
v. Smith	474	v. Willard	88
v. South, &c.	313	Willetts v. Buffalo, &c.	347
v. Wagner	95	Willey v. Portsmouth	368, 370, 380
v. Wall	246	v. Strickland	110
v. Ward	455	v. The West, &c.	319
v. Webb	617	Williams v. Adams	216
v. Winnisimmet Co.	598	v. Babbitt	141
v. Yazoo	391	v. Bower	110
Whitehouse v. Atkinson	69	v. Clough	459
Whitelegg v. Richards	125, 218	v. Crum	63
Whitfield v. Lord Le Despencer	437	v. Cummington	362
Whitford v. Panama, &c.	522	v. Dunkirk	387
Whithead v. Keyes	211, 214, 216	v. Gaines	248
Whitman v. Spencer	258	v. Gessey	535
Whitmore v. Steamboat "Caro- line"	586, 596	v. Gibbs	481
Whitney v. Allaire	78, 83	v. Gregg	404
v. Beckford	70	v. Higgins	453
v. Blanchard	154	v. Holdredge	502
v. Butterfield	132	v. Holland	532, 552, 561
v. Chicago	355	v. Ives	129
v. Elmer	518	v. Ivey	190
v. Merchants'	545	v. Lanier	93
v. Slanson	48	v. Morris	15
Whitsett v. Slater	132	v. Mostyn	159
Whitson v. Gray	78	v. Nolen	228
Whittaker v. Perry	20	v. Powell	176
v. West	374	v. Reed	483
Whitten v. Fuller	72	v. Smith	497
Wibert v. New York, &c.	319	v. Stewart	126
Wicker v. Worthy	186	v. Vanderbilt	573
Wickes v. Clutterbuck	116	v. Wood	84, 85
Wickham v. Freeman	609	Willis v. Long, &c.	316, 587, 598
Wigg v. Simonton	491	v. Warren	207
Wiggett v. Fox	469	v. Willis	72
Wiggins v. Blakeman	463	Willoughby v. Horridge	599
Wigmore v. Joy	457	Wills v. Wells	60
Wilbraham v. Snow	138	Wilmarth v. Burt	128
Wilbrand v. Eighth, &c.	301	Wilson v. Bank, &c.	280
Wilbur v. Hubbard	269	v. Barker	249
Wilcox v. Hawley	187	v. Broder	195
		v. Chesapeake	592, 593

Wilson v. Coffin	484	Wood v. La Rue	2
v. Conine	63	v. McClure	528
v. Cook	53	v. Melius	201
v. Crosby	612	v. Milwaukee	563
v. Ellis	187	v. Moorhouse	186, 193
v. Franklin	223	v. Panama, &c.	591
v. Fuller	442	v. Stourbridge	301
v. Girdleston	48	Woodburn v. Chamberlin	247
v. Hamilton 549, 567, 572, 578		Woodbury v. Frink	557
v. McLaughlin	443	v. Long	28
v. Peto	405	Woodman v. Hubbard	33
v. Shulkin	575	v. Nottingham	279, 601
v. Sparks	136	Woodruff v. Adams	57
v. Susquehannah, &c.	371	v. Halsey	243, 615
v. Tummam	411	Woods v. Burrough	39
v. The Madison, &c.	348	v. Davis	125, 127
v. York, &c.	319	v. Devin	592
Wilton v. Butler	130, 152	v. Gummert	80
v. Webster	508	v. Keyes	184, 185
Wing v. Gleason	167	v. Varnum	144
v. New York, &c.	562, 569	Woodward v. Birch	541
Wingard v. Benning	599	v. Gates	89, 97
Wingate v. Haywood	119	v. Thacher	79
v. Mechanics' Bank	282, 285	v. Walton	517
Winn v. Lowell	371, 373	v. Washburn	474
Winner v. Penniman	61	v. Webb	444
Winship v. Enfield 361, 365, 375, 380		Woodworth v. Kessain	79
Winslow v. Hathaway	156	v. Morse	534
v. Perquimans	387	Wooley v. Edson	601
v. Vermont	317, 559	Wooten v. Calehan	75
Winsmore v. Greenbank	509	Worster v. Canal, &c.	367, 372, 384
Winter v. Peterson	7	Worth v. Winbourne	210
Winterbourne v. Morgan	7	Wouder v. Baltimore	463
Wintermute v. Clark	535, 536	Wray v. Tuskegee	527
Winters v. Burford	192	Wright v. Bennett	240
v. Hannibal	334	v. Calhoun	440
Wise v. Great Western, &c.	576	v. Central, &c.	453
Wishard v. Medaris	511	v. Eaton	445
Wiswall v. Brinson	428	v. Gray	475
Witbeck v. Holland	549	v. Hazen	111
Withers v. Macon	562	v. N. Y., &c.	463
v. New Jersey	567	v. Roberts	98
Witherspoon v. Farmers' Bank	436	v. Saddler	232, 233
v. Woody	450	v. Wilcox	406
Witt v. Mayor	393	v. Willis	169
v. New York	393	Wyatt v. Williams	499
Witte v. Hague	421	Wyld v. Pickford	584
Wodell v. Coggeshall	521	Wylie v. Birch	143
Wolcott v. Buck	94	Wyman v. Penobscot, &c.	350
Wolf v. Brouwer	451	Wyndham v. Wycombe	508
v. Van Meter	193	Wyrley, &c. v. Bradley	299, 397
Wolfe v. Covington, &c.	300		
v. Mersereau	409		
Wolf v. Farrell	615		
Wood v. Bell	69		
v. Cobb	407		
v. Crocker	315		
v. Davies	67		
v. Griffin	501		

lix

Yarborough <i>v.</i> Bank, &c.	273	Young <i>v.</i> New York, &c.	470
<i>v.</i> Harper	129	<i>v.</i> Noble	282
Yates <i>v.</i> Lansing	103, 119	<i>v.</i> Rummel	13
<i>v.</i> St. John	126	<i>v.</i> Spencer	92
<i>v.</i> Wormell	161	<i>v.</i> Tustin	18
Yeager <i>v.</i> Carpenter	222		
<i>v.</i> Wallace	48		
Yonge <i>v.</i> Kinney	587, 597	Z.	
York <i>v.</i> Clopton	125		
Yorke <i>v.</i> Grenaugh	542, 599		
Yost <i>v.</i> Stout	224	Zabriskie <i>v.</i> Smith	84, 85, 86, 240
You <i>v.</i> Flinn	237	Zandom <i>v.</i> Emmons	619
Youguanzo <i>v.</i> Solomon	257, 261	Zeigler <i>v.</i> Hughes	478
Young <i>v.</i> Donaldson	193	Zimmerman <i>v.</i> Helser	17
<i>v.</i> Hall	82	Zug <i>v.</i> Laughlin	478
<i>v.</i> Hosmer	159, 208, 209	Zulkee <i>v.</i> Wing	452

THE LAW OF TORTS.

CHAPTER XXIV.

TRESPASS.

- | | |
|--|--|
| 1. Definition, and distinction from other analogous wrongs; how far a wrongful <i>taking</i> or <i>entry</i> is necessary. | 13. General defence, of property in the defendant. |
| 6. Parties. | 15. Damages. |
| 7. Pleadings; declaration; <i>continuando</i> , <i>liberum tenementum</i> , <i>license</i> , &c. | 18. Trespass upon a dwelling-house; breaking of doors; search-warrant, &c. |

§ 1. HAVING completed our view of that class of injuries, coming under the general technical head of *Nuisance*; we proceed to the consideration of another comprehensive class, namely, *Trespass*. Trespass is defined¹ as “an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another.” (a) It is also said,² that “trespass, in the most extensive sense, means any injury arising to another’s person or property from the misfeasance or act of another.” And the still more extensive definition is given by Blackstone;³ “trespass in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man’s person or his property. Therefore, beating another is a trespass; taking or detaining a man’s goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law; so, also, non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded; and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or trespass, in its largest sense.” (b)

¹ Bouv. Law Dict. (In the ancient law it is called *transgression*. *Termes de la Ley*, 565.)

² 3 Steph. N. P. 2629.

³ 3 Com. 208.

(a) *Intention* is immaterial. *Welch v. Durand*, 36 Conn. 182; 3 Sneed, 20.

(b) It is perhaps worthy of notice, that this enlarged sense of the word has re-

§ 2. As already explained, however, trespass, in its strict and technical sense, is a *wrongful entry upon or taking of* real or personal property, of a *corporeal* and *tangible* nature. The respective branches of this definition distinguish it from a mere *conversion*, on the one hand, which is the subject of the action of *trover*; and from *nuisance*, (a) on the other, for which the remedy is an action on the case. (b) In our introductory view of torts or wrongs, generally (see chapters 3 and 4), we have of course treated these various injuries somewhat promiscuously, the same principles being for the most part applicable to them all. We have also treated at length the subject of trespass to the person. (See chapter 5.) A comparatively brief view, therefore, will be sufficient, of the precise injury which the law terms a trespass, including trespass *quare clausum fregit* and trespass *de bonis asportatis*. (c)

ceived the sanction of the *Divine Law*, both in the code promulgated by Moses, so often using the comprehensive formula "if thy brother (or thy neighbor) trespass," and in the brief and simple form of prayer taught by a Higher than Moses, where *debts* and *trespasses*—in the Latin version, *debita* on the one hand, and *peccata, lapsus, offensas*, on the other—are synonymously and promiscuously used.

(a) Trespass does not lie for damage caused by building a house so near another's land, that the eaves project over and shadow and cast the water-drip upon the land. *Garraty v. Duffy*, 7 R. I. 476. See *Bangor, &c. v. Smith*, 49 Me. 9.

(b) See *Wood v. La Rue*, 9 Mich. 158; *Cook's, &c. v. Gibson*, 21 Ind. 303; *Richardson v. Milburn*, 11 Md. 340. Where the owner of land conveys it, reserving a right of way through an avenue, and afterwards builds a house in the avenue; trespass is the proper remedy for the grantee. *Hays v. Askew*, 7 Jones, 272.

If, in an action of trespass, the facts attempted to be proved do not in law amount to a trespass; the court should, on the defendant's motion, so inform the jury. *Crookshank v. Kellogg*, 8 Blackf. 256.

But the court cannot, in an action of trespass *quare clausum* draw the legal conclusion, that the acts of the defendants were a wanton trespass, from the fact that they entered without a license from the real owners. The question as to their motives is for the jury. *Longfellow v. Quimby*, 29 Me. 196.

And where goods were distrained in a house, and the person left in possession till they were replevied suffered them to remain dispersed, as he found them, over

the house, and went into all parts of it himself, no objection being made at the time; Lord Mansfield left it to the jury, in an action of trespass, as evidence of the owner's consent. *Washborn v. Black*, 11 E. 405, n.

(c) With the few differences necessarily arising from the diverse nature of real and personal estate, these actions are governed by the same general rules. And they may be joined in one writ and even one count. See *Marble v. Keyes*, 9 Gray, 221; *Carpenter v. Barber*, 44 Vt. 441.

Thus a count in trespass *de bon. aspor.*, for breaking down and carrying away the plaintiff's lime-kiln, may be joined with trespass *qu. claus.* *Heimer v. Wilcox*, 1 Cart. 29.

But a count for breaking and entering the plaintiff's dwelling-house, and taking and carrying away goods therefrom, is not supported by proving a trespass in taking and carrying away goods only. *Eames v. Prentice*, 8 Cush. 337.

But where the declaration contains but one count, to wit, for breaking the plaintiff's close and taking and carrying away his goods; he may amend, by filing a count simply for the same taking and carrying away of the same goods. *Bishop v. Baker*, 19 Pick. 117.

And where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action; actions of trespass, except those for injury to real property, being *transitory*. *M'Kenna v. Fisk*, 1 How. (U. S.) 241; *S. C.* 17 Pet. 245.

On the trial of an action of trespass *qu. claus. et de bon. aspor.*, the great questions

§ 3. The following distinctions may be noticed between the action of trespass and other remedies for the same injury.

related to the title of the personal property, and the damages claimed had reference to it alone. The cause was submitted to the jury, under a charge which, if erroneous at all, was so as to certain questions relating to a breach of the plaintiff's close, and, even as to these, was favorable to the defendant. Held, after verdict for the plaintiff, that a new trial ought not to be granted. *Holly v. Brown*, 14 Conn. 255.

Where a replevin writ is abated for informality of the bond, and a writ of return and restitution under the statute has issued, trespass does not lie for the same property. *Parker v. Hall*, 55 Me. 362.

Questions sometimes arise, in reference to injuries committed upon property partaking of the character both of real and personal estate. (See chap. 18.)

If a man cut and carry away corn at the same time, it is trespass only and not felony, because it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is felony. *Emmerson v. Annison*, 1 Mod. 89.

The entering upon real estate, and severing a part therefrom and carrying it away, by one continuous act, can be recovered for only by an action of trespass *qu. claus.* *Sturgis v. Warren*, 11 Vt. 433.

But trespass *de bon. aspor.* may be maintained, for taking and carrying away fixtures, or the portions of a building temporarily dissevered therefrom. *Wadleigh v. Janvrin*, 41 N. H. 503.

The plaintiff hired of the defendant certain rooms in the house of the defendant at a yearly rent, with the privilege of putting a brass plate, with the plaintiff's name engraved thereon, upon the front door, there to remain so long as the plaintiff should continue to occupy the apartments. The rent being in arrear, the defendant removed the brass plate from the door, and refused to allow the plaintiff to have access to the apartments. In trespass, charging that the defendant broke and entered the apartments of the plaintiff, and expelled him therefrom, and removed the plate, and seized and converted his goods, the defendant, amongst other pleas, pleaded that the plaintiff was not possessed of the brass plate. Held, that the facts warranted the jury in finding that the defendant was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to show that

it was affixed to the freehold, it must be assumed to be a chattel only. *Lane v. Dixon*, 3 Com. B. 776.

In answer to an action of tort, commenced in the Court of Common Pleas in Massachusetts, for pulling down, taking, and carrying away "a wooden building, parcel of an estate, consisting of land and buildings thereon, standing there in the occupation of the defendant, as tenant for term of years, the reversion whereof belonged to the plaintiffs," the defendant admits that he pulled down and removed the building, "but whether the same belonged to the plaintiffs he has no knowledge and can neither admit nor deny, but leaves the plaintiffs to prove," and justifies the removal. Held, that the action, if not an action of trespass to real estate (which it seems it was), was an action in which the title to real estate was concerned, and that the plaintiffs were therefore entitled to full costs if he prevailed, although he recovered not exceeding twenty dollars damages. *Willard v. Baker*, 2 Gray, 336.

In an action of tort for forcibly entering the plaintiff's close and taking up and converting two posts; the taking and conversion of the posts is matter of aggravation, and, though disproved, the action may be maintained. *Phelps v. Morse*, 9 Gray, 207.

As already stated, an *assault* is a *trespass* to the person, and therefore may be joined in an action even of trespass *qu. claus.* To an action of tort, brought by husband and wife for breaking and entering their close and injuring the wife, the defendant pleaded soil and freehold in himself, and a receipt in full of all demands. The judge instructed the jury, that the plaintiffs jointly could not maintain this action as an action of trespass *qu. claus.*, but might recover for any personal injury to the wife; and the issue under this ruling was the only one submitted to the jury, who returned a verdict for the plaintiffs for twenty dollars. Held, the title to real estate was not brought in question, and the plaintiffs were therefore entitled for their costs, under Rev. Sis. c. 121, § 3, to no more than one quarter part of the damage. *Robbins v. Sawyer*, 3 Gray, 375.

Where a declaration alleges a wrongful entry of a close, with other personal injuries by way of aggravation only; it is held, that the plaintiff cannot recover damages for the personal injuries, if he fail to establish the wrongful entry, they

§ 4. It is held that a trespass on the land of another will not amount to an *ouster*, without a knowledge thereof by the owner, either express or implied.¹

§ 5. In reference to the two actions of trespass and trover (see ch. 25), it is held that trespass and trover are different actions in their very nature. Trover lies upon a demand and refusal, but trespass does not. Hence a judgment in trespass is not necessarily a bar to an action of trover for the same goods. Thus if, in trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict; yet, if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought trover instead of trespass, this recovery cannot be pleaded in bar to trover for the cattle.² And the general rule is, that trespass will not lie, against a person coming to the possession of goods lawfully, for the subsequent unlawful conversion.³ So it is held that, where a right to enter on land exists, certainly unless arising merely *in law*, its *abuse* by acts of wrong subsequently committed is not a trespass.⁴ (a) So where the defendant, claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent; held, the acts of the defendant did not amount to a *taking*, and trespass was not maintainable.⁵ And where one of two partners makes a general assignment, in the name of the firm, of all the partnership property, in trust for the payment of debts of the company, and delivers the property to

¹ Pray v. Pierce, 7 Mass. 381.

² Putt v. Roster, 2 Mod. 319; 3 Mod. 1.

³ Bradley v. Davis, 2 Shep. 44.

⁴ Edelman v. Yeakel, 27 Penn. 26; Hunnewell v. Hobart, 42 Me. 565.

⁵ Hartley v. Moxham, 3 Gale & Dav. 1; 3 Ad. & Ell. N. S. 701.

being merely incident thereto. Reed v. Peoria, &c., 18 Ill. 403.

Where the complaint alleges that the defendant unlawfully entered the plaintiff's premises and removed a water-gate: the gist of the action is the entry; the removal of the gate is but aggravation, and, if the former is not proved, no damages can be recovered for the latter. Pico v. Colimas, 32 Cal. 578.

An answer, justifying the aggravation, but admitting the plaintiff's title and possession, does not state a good defence. Ibid.

Nor an answer on the ground of an easement on the land. Ibid.

Nor an answer that one defendant was a water commissioner for the district, but

not that the other entered in aid of him. Ibid.

(a) See *Trespass ab initio*.

After a delivery of goods sold, it is held that the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring trespass against a person taking them away. M'Carty v. Vickery, 12 Johns. 348.

So one who receives goods as a warehouseman, from one who obtained them by the commission of a trespass, and on demand refuses to deliver them to the owner, is not liable in trespass. Trover, or detinue, is the appropriate action. Prince v. Puckett, 12 Ala. 832. See Butler v. Collins, 12 Cal. 457.

the assignee; and the other partner, who is under age, ratifies the assignment: on coming of age he cannot maintain an action of trespass against the assignee, for the alleged unlawful taking and asportation of the property.¹

§ 5 *a*. But to maintain trespass *de bon. aspor.*, evidence of a *forcible* taking is not required.² (*a*) Thus a ship-owner, who refuses to carry a passenger whom he has engaged to carry, and proceeds on the voyage without giving the passenger reasonable opportunity to remove his luggage, or with the intent to carry it beyond his reach, thereby terminates the contract of carriage, and is liable in trespass for the carrying away of the luggage.³ So a deed conveying land to a corporation, which had been delivered to an agent of the corporation for safe-keeping, was subsequently given up by him to the grantor at the grantor's request, and on the ground that he had objected to the deed at the time when it was executed. Held, that trespass might be maintained by the corporation against the grantor, at least for nominal damages.⁴ So actual force is not necessary to constitute a trespass upon land. But every one, who enters into the possession of unoccupied lands, without right or title derived from the owner or the law, and more especially without *claim* of title, and for the purpose of keeping the true owner out of possession; is a trespasser.⁵ And a *peaceable* entry is held not to be one merely unaccompanied with actual violence or breach of the peace.⁶ And the *intent* is immaterial. It is enough that the act is injurious and without a justifiable cause or purpose; though done accidentally or by mistake.⁷ So a trespass may be committed by an agent.⁸ So trespass lies for an entry upon land, though beneficial to the owner.⁹ So trespass *qu. claus.* will lie, without even actual *entry* on the land; as where the defendant stood elsewhere than upon the plaintiff's land, and shot game thereon.¹⁰

¹ Furlong v. Bartlett, 21 Pick. 401.

² Gibbs v. Chase, 10 Mass. 180.

³ Holmes v. Doane, 3 Gray, 328.

⁴ Second Cong. Society v. Howard, 16 Pick. 206.

⁵ McCall v. Capehart, 20 Ala. 521; Newkirk v. Sabler, 9 Barb. 652; 1 Swan, 96; 15 Ill. 53.

⁶ Norvell v. Gray, 1 Swan, 96.

⁷ Cate v. Cate, 44 N. H. 211.

⁸ Allen v. Archer, 49 Me. 346.

⁹ Parker v. Griswold, 17 Conn. 288.

¹⁰ Pickering v. Rudd, 1 Stark. 56. But see Keble v. Hickringill, 11 Mod. 74, 130.

(*a*) Forcible trespass on personal property is the taking of it from the owner by force in his presence. *Intimidation* is not necessary. State v. Pearman, Phill. (N. C.) L. 871.

Evidence that the plaintiff, when the passengers of a steamer were landed in tug-boats, was prevented by the defend-

ants from taking her trunk with her into the boat in which she was landed, and was told that it must go in the other boat, and that she thereupon took it to the other side of the steamer, and had it put on board the other boat, is not sufficient evidence of a "forcible taking." Tolano v. National, 5 Rob. (N. Y.) 318.

Or where one stands on his ground or in the street, and with missiles breaks the house of another.¹ So, where A brought an action of trespass against B., for breaking and entering his close, and cutting and carrying away certain pine timber; and the evidence tended to show that the timber was not cut on the plaintiff's land, but was drawn across it: held, the action could be maintained, even if the cutting were not upon the plaintiff's land.² So placing a shaft from one building to another, across a passage-way of which another person owns the fee, is an actionable trespass, although the shaft passes under a bridge or platform, and does not interfere with the use of the passage.³

§ 5 *b*. And although, in general, a trespass involves an original unlawful taking or entry, yet, as in case of nuisance, so trespass is the proper remedy for wrongfully *continuing* a building on the plaintiff's land, for the erection of which he has already recovered compensation. A recovery, with satisfaction, even by money paid into court for the erection, does not operate as a purchase of the right to continue the trespass; but, after notice and refusal to remove, a new action may be brought.⁴ And where the bargainor in a deed, after executing a conveyance, remains in possession, and, contrary to the expressed wishes of the bargainee, cuts down timber, he is liable to an action of trespass *quæ claus*.⁵ But although, where the rightful owner of land is dispossessed, he may maintain an action against the wrong-doer for the original trespass, he cannot for any injury afterwards committed by such wrong-doer until he has regained possession.⁶ And if the defendant continues in actual possession, after a recovery and satisfaction in trespass, the plaintiff cannot maintain a second action against him for continuation of the trespass, unless he shows a title which would carry with it the constructive possession.⁷ (a) And it may be further

¹ Prewitt v. Clayton, 5 Monr. 4.

² Brown v. Manter, 2 Fost. 468.

³ Esty v. Baker, 48 Me. 495.

⁴ Holmes v. Wilson, 10 Ad. & Ell. 503.

⁵ Spencer v. Weatherly, 1 Jones, 327.

⁶ Rowland v. Rowland, 8 Ham. 40.

⁷ Segar v. Kirkley, 23 Ala. 680.

(a) In trespass *quæ claus*. the declaration alleged, that the defendant, on a day specified, broke and entered the plaintiff's close, and ejected him therefrom, and kept and continued him so ejected from thence hitherto, whereby the plaintiff, during all that time, lost the use and benefit of said close. Held, the declaration was good; that it did not present a claim for damages for the continuance of the trespass, but only showed the character of the original trespass, as being a

complete disseisin, and not a mere temporary possession. *Bailey v. Butcher*, 6 Gratt. 144.

In trespass for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him. Held, that the leaving of the stumps and stakes on the

remarked, that, in trespass *qu. claus.*, the gist of the action is the breaking and entering the plaintiff's close; *the injury done therein* is matter of aggravation only. Hence it is not an objection to the whole count, that such injury is not well laid.¹ So a party putting a fence on, or ploughing, the land of another, although not materially injuring him, is liable as a trespasser.² (a)

§ 6. In reference to the *parties* to an action for trespass, we have already fully explained (chapter 19) the sufficiency and necessity of *possession*. This element, applicable to some extent to all forms of injury, is more especially so in case of trespass. The possession, however, or ownership, has reference to the time of the injury, not of the action. Thus trespass *de bon. aspor.* is rightly brought, in the name of the person who was the owner of the goods at the time of the trespass, although he may have sold them before the action was commenced. And if the vendee brings such action in the name of the vendor without authority, the defendant should make the objection at the first term. A judgment in such action, prosecuted for the benefit of the vendee, would be a bar to an action of trover subsequently brought by the vendee in his own name.³ So, if A's personal property is attached in a suit against B, and A sells and assigns his property to a third person while it is under attachment; an action of trespass for the benefit of the vendee against the attaching officer is properly brought in the name of A.⁴ So one who has aliened the land, before action brought, may maintain trespass *qu. claus.* for a trespass committed

¹ Rucker v. O'Neily, 4 Blackf. 179.

² Pfeiffer v. Grossman, 15 Ill. 53.

³ Boynton v. Willard, 10 Pick. 166.

⁴ Holly v. Huggefords, 8 Pick. 73.

land was a new trespass. *Bowyer v. Cook*, 4 Com. B. 236.

Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held, that at any rate he was liable in trespass *qu. claus.*, for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne v. Morgan*, 11 E. 395.

(a) With regard to *intention*, as affecting this action, it has been recently decided, that in trespass *qu. claus.* the intent is immaterial. *Luttrell v. Hazen*, 3 Sneed, 20.

But it has been held, that, in trespass against an overseer of the highway, for cutting down a tree therein, evidence is

admissible, of improper motives, and that the act was done maliciously. But the state of feeling between the parties *at the time* is alone material, and not the cause or history of the quarrel. *Winter v. Peterson*, 4 Zab. 524. See *Higbee v. Camden*, 5 C. E. Green, 435.

So in an action of trespass, for pulling down a house which had been rented by the defendant to the plaintiff, testimony of a threat, that, if the plaintiff's daughter did not yield to the defendant's unchaste solicitations, he would pull down the house, is competent evidence to show the malicious feelings of the defendant, and to establish the identity of the person committing the act; and a threat to kill the daughter, if she did not yield, is also evidence to prove the malice of the defendant. *Chapman v. Kincaid*, 8 Humph. 150. See *Halsey v. Matthews*, 3 Ind. 404.

before alienation.¹ And it may be further remarked, that in this action time is not material (see § 8); and, if the trespass is alleged to have been committed before the title of the plaintiff accrued, it may be proved to have been afterwards.² (a)

§ 7. With reference to the *pleadings* in the action for trespass, it may be remarked, that they are for the most part required to be more accurate and technical than in other actions for tort. A few of the more general rules may here be stated. (b)

§ 8. With regard to the *time* of the injury, a declaration — as, for example, for cutting down trees, on several occasions — may allege the trespasses to have been committed on different days and times, but not with a *continuando*.³ But, where a day is laid in the declaration, and from such day to the commencement of the action divers trespasses were committed, one trespass only may be proved prior to the day named, but divers may be proved within the time laid.⁴ And, on the other hand, in trespass *qu. claus.* alleged to have been committed *diversis diebus*, &c., if the plaintiff give evidence of one or more acts of trespass within the days specified, he shall not prove an act done at any other time; but he may waive his right to prove any act within the days, and may prove one done at any other time allowed by the statute of limitations.⁵ It is said, “Originally every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a distinct writ or count for every different act, the plaintiff is permitted to declare for a trespass on divers days and times between one day and another; and such a declaration is considered as if it contained a distinct count for every different trespass. But as this

¹ M’Gran v. Bookman, 3 Hill (S. C.), 265.

² Cooper v. Taylor, 3 Green, 455.

³ Rucker v. M’Neely, 4 Blackf. 179.

⁴ United States v. Kennedy, 3 McLean, 175.

⁵ Pierce v. Pickens, 16 Mass. 470; Powell v. Bagg, 15 Gray, 507.

(a) As to trespass against an *administrator*, see Perkins v. Blood, 36 Vt. 274.

(b) See Redman v. Taylor, 3 Ind. 144. Like other actions for injury to real property, the action of trespass *quare claus.* is local, and can be brought only in the county in which the trespass was committed. Haim v. Rogers, 6 Blackf. 559; Champion v. Doughty, 2 Harr. 8; Chapman v. Morgan, 2 Greene, 374.

It must be proved that the close described is within the county. Prichard v. Campbell, 5 Ind. 494.

And the plaintiff cannot prove a trespass anywhere but where it is laid in the declaration, nor lay it anywhere but where it is done. Walrond v. Van Moses, 8 Mod. 321.

is for the advantage and ease of the plaintiff, he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass — in which case the time becomes immaterial. As it would give the plaintiff an undue advantage, if he could avail himself of the declaration in both these modes, and might operate as a surprise on the defendant; the plaintiff must take his election before he begins to introduce his evidence.”¹ (a)

§ 8 a. In general, where a particular *place* is assigned in the declaration, the trespass must be proved as laid.² And evidence of a trespass upon lands other than those described in the writ is not admissible.³ Thus, where the owner of several closes in the same town declares, generally, that the defendant broke and entered his close in that town, and thereon committed certain acts: he may prove such acts on any one close in that town; but he must be confined to that close, whether testimony as to an entry upon another be objected to or not.⁴ And, in trespass for breaking the plaintiff's close and destroying his mill-dam, evidence of a trespass committed on a part of the dam without the close is inadmissible.⁵ So, the plaintiffs being owners of a close and a mill thereon on the north side of a river, and their mill-dam being rightfully extended to land on the other side which they did not own, the defendants crossed the river below the plaintiff's land, and destroyed a part of the dam on the south side, and, having effected their object, they recrossed the river at the same place and went upon the plaintiff's close. Held, the destruction of the dam and the entry upon the close were distinct trespasses, so that a judgment for the latter would not be a bar to an action for the former.⁶ But, in trespass for breaking and entering the plaintiff's close, and destroying his mill-dam, evidence is admissible of the destruction of a dam in the same close and across the same stream,

¹ Per Jackson, J., *Pierce v. Pickens*, 16 Mass. 470. See *Haak v. Breidenbach*, 3 S. & R. 204.

² *Manning v. M'Donnell*, 3 Brev. 15.

³ *Longfellow v. Quimby*, 29 Me. 196.

⁴ *Elliott v. Shepherd*, 25 Me. 371.

⁵ *White v. Mosely*, 5 Pick. 230.

⁶ *Ibid.* 8 Pick. 356.

(a) The levy, carrying away, and sale of a plaintiff's goods, although taking place upon different days, will constitute but one act of trespass, and the plaintiff cannot be put to his election, as to which he will proceed upon. *Browning v. Skillman*, 4 Zab. 351.

Where one count alleges various trespasses upon land accompanied by particular acts of injury, a judgment for some of

those acts is a bar to a subsequent action for others. *Goodrich v. Yale*, 8 Allen, 454.

Under an averment of breaking and entering the plaintiff's close and of *alia enormia*, upon a plea of not guilty, the plaintiff may prove the pulling down of his house in the same town alleged, without a distinct averment thereof. *Snider v. Myers*, 3 W. Va. 195.

at some distance above the mill, called the false dam, and used only for stopping the water for the convenience of repairing the mill-dam below.¹

§ 9. It has been held, that a declaration in trespass for breaking the plaintiff's close, &c., is bad, on general demurrer, if it do not describe the close.² So, that the *locus in quo* ought to be designated by abutments or other description, as it stood at the time of the trespass, and not at the time of the declaration.³ But on the other hand it is held not necessary to describe the close, either by name or by abutments.⁴ And, in respect to the terms of description, where the declaration describes the close as bounded north on the land of an adjoining owner, it is sufficient to show that owner's land to be in any degree north.⁵ So it is sufficient to describe the land as abutting on a windmill, though a highway lies between.⁶ So, if the land is described as part of a particular lot, and also as bounded by particular lines and monuments, evidence may be offered in reference to any land falling within such bounds, though not included in the lot named.⁷ (a)

§ 10. In an action of trespass for taking and carrying away goods, the omission to state the *value* of the goods is matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value.⁸ So, in an action of trespass for an injury to cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer.⁹

§ 11. With regard to the defence against an action for trespass,

¹ Durgin v. Leighton, 10 Mass. 56.

² Moody v. Hinkley, 34 Me. 200.

³ Humphrey v. London, &c. 20 Eng. L. & Eq. 384.

⁴ Noyes v. Colby, 10 Fost. 143.

⁵ Rollins v. Varney, 2 Fost. 99.

⁶ Nowel v. Sands, 2 Rolle's Abr. 677.

⁷ Poor v. Gibson, 32 N. H. 415.

⁸ Baker v. Baker, 13 Met. 125.

⁹ Bean v. Green, 4 Cush. 279.

(a) A declaration described the close as bounded northerly by land of S and others, easterly by the old N. B. Turnpike, southerly by the road leading to W., and westerly by W. River. Held, that this description sufficiently complied with a statute, which required that "the close, or place of the alleged trespass, shall be designated by name or abutments, or other proper description." Forbush v. Lombard, 13 Met. 109.

In an action of trespass, the declaration alleged that the defendant "broke and entered the plaintiff's dwelling-house in L., being the same dwelling-house occupied by the plaintiff, with force and arms, and did

then and there imprison the plaintiff for the space of one hour, without any legal or probable cause." Held, that this was an action of trespass on real estate, *qu. claus. fregit*, and that the place of the alleged trespass was sufficiently designated by name according to the above statute. Sawyer v. Ryan, 13 Met. 144.

A judgment for the defendant in trespass *q. c. f.*, does not necessarily settle anything beyond the particular facts of the trespass sued for; not the title to another part of the close or a subsequent right of possession. Morse v. Marshall, 97 Mass. 519.

the general rule is, that every defence, which admits the defendant to have been *prima facie* a trespasser, must be specially pleaded; but a denial of the acts may be made under the general issue. So also a denial that the plaintiff had a property in the land or goods; which may be proved, under this issue, by showing a freehold and immediate right of possession in the defendant.¹ (a) In conformity with this rule, as has been already explained (chap. 18), *title* is a good defence to an action for trespass. But, although it may be offered in evidence under the general issue, yet the plea of *liberum tenementum*, with a right of entry, is also a familiar form of defence.² (b) The plea is held to put in issue only the question whether the premises are the freehold of the defendant or not.³ And it must distinctly present this question. Thus in trespass for breaking and entering the doors and windows of a meeting-house, a plea that the defendants entered as members of the religious society, peaceably, for the purpose of religious worship, as they might lawfully do, doing no unnecessary damage, which are the supposed trespasses; is bad on demurrer, in not alleging that the defendants were members of the society, and not denying the acts charged as trespasses, nor setting forth any cause in justification of them.⁴ And the general issue and *liberum tenementum* may be pleaded together.⁵ (c) In which case the burden

¹ 1 Chit. Pl. 437; 2 Greenl. Ev. § 625; *Riley v. Denny*, 2 Rich. 539.

² *Crockett v. Lashbrook*, 5 Monr. 530.

³ *Gilchrist v. McLaughlin*, 7 Ired. 310.

⁴ *Baptist Society v. Fisher*, 3 Harr. 240.

⁵ *Hext v. Jarrell*, 2 Strobb. 172. See *Dover School v. M'Farlan*, 2 Green, 471.

(a) In general, *title at the time of the alleged trespass* must be shown. But this rule does not apply to any mere formal authentication of title, which will be sufficient if made before the trial. Thus a judgment record, which is the evidence of such title, need not have been signed and filed at the time of the alleged trespass, if signed and filed before the trial. *Van Orman v. Phelps*, 9 Barb. 500.

(b) It is held that this plea may be made, though the declaration describes the close with precision, by metes and bounds, &c. *Fisher v. Morris*, 5 Whart. 358. See *Mechanics' v. New York*, 13 N. Y. 599.

But, on the other hand, the plea itself is required thus to describe the close, where the nature of the defence requires a designation more particular than that in the writ. Thus the defendant pleaded, as to so much of the land described in the declaration, as lay on one side of a line set forth in a conveyance referred to, *soil and freehold*; and as to the rest of it not

guilty. Held, as the plea did not describe the line by fixed monuments on the land, it was bad on demurrer. *Orange v. Berry*, 4 Fost. 105. See *Wells v. Jackson*, 44 N. H. 61.

This plea is not good to a declaration for breaking the plaintiff's close, and beating him, his servants, and horses. *Tribble v. Frame*, 3 Monr. 13. See *Willard v. Warren*, 17 Wend. 257.

(c) Where the defendants pleaded not guilty as to the force and arms, and a special justification as to the residue of the trespass, and the jury returned a general verdict of not guilty, judgment was entered thereupon. *Hodges v. Raymond*, 9 Pick. 316.

But where the defendant pleaded: 1. the general issue; 2. *liberum tenementum* with a justification; and the jury returned a verdict of guilty on the first issue and not guilty on the second; held, such verdict must be set aside for uncertainty. *Turner v. Beatty*, 4 Zab. 644.

is on the plaintiff to prove his case, and he is entitled to open and close.¹ But a plea of title alone admits the possession of the plaintiff, and he need not prove it.²

§ 12. On the trial of issues, on general replication to *liberum tenementum*, pleaded to two counts, the plaintiff cannot recover, unless he proves two closes, and a trespass on each, if the defendant is entitled to land in the county.³ But, where the declaration alleges the trespass in entering the close and dwelling-house of the plaintiff, and the defendant pleads *liberum tenementum*, he must confine his proof to the dwelling-house, and may not show title in another tenement.⁴ (a)

¹ Jennings v. Maddox, 8 B. Monr. 430.

² Appleby v. Obert, 1 Harr. 336.

³ Tribble v. Frame, 7 Monr. 529.

⁴ Hope v. Cason, 3 B. Monr. 544.

(a) With regard to the right of recovering for only a part of the cause of action alleged, it is no defence to an action of trespass for taking and carrying away certain articles, that the defendant owned and had a right to carry away one of them; but the plaintiff may recover for the others. *Holley v. Brown*, 14 Conn. 255.

If a declaration contain several counts, a plea, professing to answer the whole declaration, answering only one of the counts, and not averring the identity of the trespasses described in the different counts, is bad on general demurrer; and, although it contain the averment of identity, is bad on special demurrer. *Rubottom v. McClure*, 4 Blackf. 505.

So, in trespass *qu. claus.*, where the plaintiff declares, setting out the close with abutments; upon the plea of *liberum tenementum*, it is not necessary that he should show title to every part of it; it is enough if he show title to that part of the close in which the trespass was committed. *King v. Dunn*, 21 Wend. 253.

So, if the plaintiff shows trespasses on different parts, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. *Dunkle v. Wiles*, 6 Barb. 515.

The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has a title to the whole, in order to succeed; but each may succeed *pro tanto*, according to the proof. *Ibid.*

It is said, "When the defendant, following the declaration, asserts in his plea, that the close in which, &c., is his soil and freehold, this plea means, that the part of the close so described in the declaration, on which he admits that he has done the acts complained of, was his soil and freehold. By this plea, therefore, he undertakes to prove two propositions: first, that some part of the described close belongs to him;

and secondly, that it is on this part of the close, that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed." Per *Alderson, B., Smith v. Royston*, 1 Dowl. P. C. (N. S.) 124.

Where the issue in trespass *qu. claus.*, was, whether "the close in which," &c., was a certain close known by the name of B., and whether the same close, for thirty years last past and upwards, had been separate from a certain common; and the jury found that part of B. had been enclosed within thirty years, and that the alleged trespass had been committed in the enclosed part only: held, upon this finding, the defendant was entitled to the verdict. *Richards v. Peake*, 4 Dowl. & Ry. 572.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close, in which, &c., was part of an allotment of six acres made by commissioners, duly authorized, for certain purposes, in execution of which he entered. The plaintiff denied that the close in which, &c., was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. It appeared that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it. Held, that the justification was made out. *Bassett v. Mitchell*, 2 B. & Ad. 99.

If, in an action of trespass *qu. claus.*, the defendant pleads specially, that the act complained of was not committed where the plaintiff, in his declaration, alleges it was, but upon an adjoining lot, where the defendant was justified in committing such act; the plea amounts to the general issue, and the plaintiff will be entitled to judgment upon a demurrer thereto. *Dorman v. Long*, 2 Barb. 214.

§ 13. In trespass to personal property, as well as *qu. claus.*, if the general issue alone is pleaded, and the trespass is proved or admitted, the plaintiff must have a verdict for some amount.¹ And, generally, in an action of trespass, under the plea of not guilty, the defendant cannot give in evidence matter in discharge.² Nor evidence of a former recovery.³ So a license from the plaintiff, if not specially pleaded, cannot be used in justification, but only in mitigation of damages.⁴ Though it is generally otherwise in an action brought before a justice of the peace, a license not bringing the title to the land in issue.⁵ So it has been held, in trespass *qu. claus.*, that the defendant may prove title in a third person, and a license from him, under the general issue, or plead such facts specially.⁶ (a)

¹ Hendrix v. Trapp, 2 Rich. 93.

² Austin v. Norris, 11 Vt. 38.

³ Young v. Rummel, 2 Hill, 478. See Maynard v. Tidhall, 2 Wis. 34.

⁴ Hendrix v. Trapp, 2 Rich. 93; Hill v.

Morey, 26 Vt. 178. See Cox v. Dove, Martin, 43; Lee v. Meeker, 2 Wis. 487.

⁵ Wheeler v. Rowell, 7 N. H. 515.

⁶ Rasor v. Qualls, 4 Blackf. 286.

(a) The following are enumerated as the various defences which may be set up by special plea to the action of trespass: "An excuse of the trespass, on account of a defect of fences, which the plaintiff was bound to repair, and a license from the plaintiff, and a justification under a rent-charge, or in respect of any easement or incorporeal right, as common of fishery, or of pasture, or of turbary; and a right of way, either public or private, and whether by grant, will, prescription, custom, or of necessity, must be pleaded. So the defendant must plead an entry, by authority of law without process, as that the *locus in quo* was an inn, or that the defendant entered to demand payment of his debts; or to prevent murder; or by virtue of process, civil or criminal, of a superior or inferior court, under mesne process, as a *latitat*, &c., or under final process, as a *fi. fa.*, *elegit*, &c., and in trespass to land, where a removal of personal property is also alleged, the plea should, as to the personal property, be special, and show possession of some land, &c., and justify the removal, &c., damage feasant, &c. In all actions of trespass, whether to the person, personal or real property, matters in discharge of the action must be pleaded; as accord and satisfaction, arbitration, release, former recovery, tender of sufficient amends, and the statute of limitations. Actions against public officers, however, are usually excepted by express statute from the requisition of special pleading." 1 Chit. Pl. 497-8.

The sale of a ticket to a concert is only a revocable license to the purchaser to enter the building, and attend the performance; and, if revoked before the performance has commenced, and before he has taken the seat to which the ticket entitles him, and he remains therein after notice of the revocation, and refuses to depart upon request, he becomes a trespasser, and may be removed by the use of necessary force; and his only remedy therefor is by an action upon the contract. *Burton v. Scherpf*, 1 Allen, 133.

The plaintiff, in 1833, covenanted with the defendant, that he and his heirs and assigns would keep open, as a public highway, a road sixteen feet wide, over his land, from a certain turnpike to a canal basin and landing-place, which the defendant was about to construct; also to keep open, as a public highway, certain other land near the basin, from the time the canal was put in navigable order for sloops of ordinary size, forever; provided, that the boating business was continued on the canal; the plaintiff to have the right, if it was discontinued, to shut up the highway until it was resumed. The canal was immediately after constructed, running from Long Island Sound to the basin, and the roads were opened. In 1858, the plaintiff made a fence across the first described way, which the defendant removed, and the plaintiff sued him in trespass. At this time the boating business had been destroyed by the construction of a railroad bridge across the canal below the basin,

§ 14. It may be added in this connection, without reference to the pleadings, that, as already explained (chap. 18), it is a sufficient defence to an action of trespass, that the acts complained of were done in asserting the defendant's title to his own property. (a) Thus the landlord may peaceably enter upon a tenant at sufferance.¹ So the owner of a shade-tree, finding another's horse hitched to it, may remove the horse to a safe place.² So the plaintiff placed a seine-reel on the land of the defendant near to a river, and the defendant gave him reasonable notice to remove it, and, on his neglect to remove it, cut it down and shoved it towards the river, and it floated off. Held, the defendant's acts were justifiable, and not a trespass upon the plaintiff.³ So in trespass for pulling down hedges, the defendant may justify that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy his common *in tam amplo modo*, &c.⁴ So a person finding horses trespassing on his land may turn them into the highway, and is not liable, though they may be lost in consequence.⁵ So one lawfully

¹ *Esty v. Baker*, 50 Me. 325. See *Com. v. Dougherty*, 107 Mass. 243.

² *Gilman v. Emery*, 54 Me. 460.

³ *Almy v. Grinnell*, 12 Met. 53; *Dean v. Comstock*, 32 Ill. 173.

⁴ *Mason v. Caesar*, 2 Mod. 66.

⁵ *Humphrey v. Douglass*, 10 Vt. 71. See *Crane v. Mason, Wright*, 333.

for which injury the defendant had received compensation from the railroad. A part of the basin had also been filled up and a new landing-place made thereupon. A considerable trade in lumber was, however, kept up on the canal, and the basin continued to be used in connection with such trade. Held, the conditions were applicable only to the second, not to the first way. That, if the terms "landing-place or basin" were not merely descriptive of the place at which the road was to terminate, but of the object of the road, and limited its continuance; yet the landing-place or basin was to be considered as still existing and in use. That the defendant had a right to remove the obstruction, and was not compelled to sue upon the covenant. And that it was not necessary that, at the time of such removal, he should have been passing upon the road for the purpose of going to the basin. *Quintard v. Bishop*, 29 Conn. 366.

If a defendant justifies an alleged trespass to real estate under a deed from a former owner, under whom the plaintiff also claims, which is prior to the title relied on by the plaintiff; the plaintiff may prove that the description of the premises conveyed to the defendant, as inserted in the

deed, includes two adjoining lots, and that the contract of sale related to only one of them, and did not include the *locus in quo*; that the description was fraudulently inserted in the deed without the knowledge and against the will of the grantor; and that the grantor, upon discovery of the fraud, after execution of the deed, re-entered upon the *locus*, and repossessed himself of it, and while in possession conveyed to the plaintiff; although the deed to the defendant purported to convey but one lot of land, embraced in a single description, and neither the grantor nor the plaintiff has ever offered to return to the defendant the consideration paid by him for his deed. *Walker v. Swasey*, 2 Allen, 312.

(a) See *Harrison v. Harrison*, 11 Am. Law Reg. 44. This defence cannot be set up by the grantee of a mere executory purchaser. *Dean v. Comstock*, 32 Ill. 173.

In trespass *qu. claus.*, the defendant may prove, in mitigation of damages, that the trespass was not wilful and malicious; as that he entered to survey off a portion of the premises sold for quit-rents. *Machin v. Geortner*, 14 Wend. 239. See *State v. Woodward*, 50 N. H. 527.

attempting to impound cattle may use all necessary force in self-defence, and defence of his possession. And a subsequent failure to impound will not make such force a trespass *ab initio*.¹ So in trespass for entering a yard, the defendant was allowed to plead, that he entered for the purpose of viewing a mare, then in a stable in the yard, which had been recently stolen from him.² So, where the sale of a horse is procured by the fraudulent representation of the buyer, the seller, having rescinded the sale, may peaceably enter the premises of the buyer, if not forbidden, and take the horse.³ So if a contract by A, to erect a building on B's land, be rescinded before completion, A, or those under him, may lawfully enter on the premises of B, to remove their property intended for use in such contract, doing no unnecessary damage. And if the defence to an action for such entry aver that the contract was abandoned in consequence of B's interference, it is still competent to show, under such specification, that the abandonment was by mutual consent.⁴ And in general the plea of *license*, which is the technical foundation of the defence now under consideration, includes a license in *law* as well as in *fact*; as an entry to execute legal process, or to distrain; or by a remainder-man, &c., to see whether waste has been done or repairs made; or by a commoner, to view his cattle; or by a landlord at the expiration of the lease.⁵ So if the plaintiff's goods, left in the defendant's building, were an incumbrance, and he removed them to the plaintiff's close; or if the plaintiff unlawfully took the defendant's goods and conveyed them within the plaintiff's close, and the defendant thereupon, making fresh pursuit, entered and retook them: the facts may be relied upon as a license.⁶ So, upon the ground of an implied license, a mother cannot maintain an action, as for a trespass, against the husband of her deceased daughter, who has buried the wife in a public burial-ground, for removing a stone placed at the grave by the mother, without injury, and for the purpose of substituting another.⁷

§ 14 *a*. But it is sometimes held no justification of an entry upon another's land, that the goods of the party entering were upon the land, and the owner of the goods entered to take them.⁸

¹ Barrows v. Fassett, 36 Vt. 625.
See Cate v. Cate, 44 N. H. 211.

² Webb v. Beavan, 6 M. & Gr. 1055.

³ Wheelden v. Lowell, 50 Me. 499.

⁴ Arrington v. Larrabee, 10 Cush. 512.

⁵ 5 Com. Dig. 805; Pleader, 3 M. 35.

⁶ Rea v. Sheward, 2 M. & W. 424; Patrick v. Colerick, 3 Ib. 483.

⁷ Durell v. Hayward, 9 Gray, 248.

⁸ Anthony v. Haney, 8 Bing. 186; Heermance v. Vernoy, 6 Johns. 5; Williams v. Morris, 8 M. & W. 488; 9 Barb. 652; Blake v. Jerome, 14 Johns. 406. *Contra*, Chambers v. Bedell, 2 W. & S. 525. See Carpenter v. Halsey, 11 Am. Law Reg. 62; 60 Barb.

More especially, if the goods were wrongfully placed upon the land, the owner has no right to retake them by force. Thus where A sent his horses and wagon on to the land of B, after being forbidden by B to do so, and the servant of A, in returning, found the fence put up at the road, so as to prevent his taking away the horses and wagon, and left them on the land and went to inform his master: held, A had no right to enter upon the land of B for the purpose of taking his team away; and, A having proceeded forcibly to tear down the fence, for the purpose of entering, that B had a right to defend his possession against such aggression, and to use as much force as was necessary therefor.¹

§ 14 *b*. And the defendant, more especially in pleading, is required to show that his act, which would otherwise be a trespass, was necessary at the time, in asserting a title to his own property. Thus, to trespass for breaking and entering the plaintiff's close, called *the manor*, the defendants pleaded, first, not guilty, and second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public and common navigable river from time immemorial; and that there is, in that part of the port which is within the manor, a certain ancient work or erection, belonging to the said port, necessary for the preservation of the same, for the safety and convenience of the ships resorting thereto; that this work being damaged and in decay at the said times when, &c., it became necessary that the said work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendants entered and repaired. Replication, *de injuriâ suâ*. A verdict having been found for the plaintiff on the general issue, and for the defendant on the special plea; held, that the plaintiff was entitled to judgment, notwithstanding the finding on that plea, inasmuch as it did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that the defendants had occasion to use the port.² (*a*)

¹ Newkirk v. Sabler, 9 Barb. 652.

² Lonsdale (Earl) v. Nelson, 3 D. & Ry. 556.

(*a*) But, in trespass *qu. claus.*, if the defendants justify under a statute, authorizing a corporation to take the land for public use, the plea need not allege that the corporation have taken the proper measures to ascertain the damages. Such

matter, if available to the plaintiff, should be replied. Rubottom v. M'Clure, 4 Blackf. 505.

The defendant broke and entered the plaintiff's close, for the purpose of taking

§ 15. We have already referred to the subject of the *measure of damages*, in actions for torts, generally (a) (vol. i. chap. 3). It may be here added, that, with regard to the damages in the action for trespass, conformably to the general rule, trespassers are liable for all such damages as necessarily arise from their acts. Thus they are liable, not only for the materials of a sluiceway to a mill, destroyed by them, but also for damages sustained by the owner in being deprived of the use of it.¹ And consequently, in trespass for taking away property, and depriving the plaintiff of the use of it, the plaintiff may prove the value of the use during the time he was deprived of the possession.² And the defendant cannot justify, upon the ground of a benefit to the plaintiff arising from the trespass, and subsequent thereto. Thus, in trespass *qu. claus.*, it is no defence, that after breaking the plaintiff's close the defendant erected valuable buildings on the land.³ But where the defendant co-operated with the plaintiff's tenants, though wrongfully, in tearing down an old mill, in such a condition that the profits could not have exceeded the repairs, and erecting another more valuable in its place; it was held, in an action of trespass, that the plaintiff could only recover nominal damages.⁴

§ 16. In an action of trespass for taking a slave out of the immediate possession of the plaintiff, evidence of abusive language to the plaintiff, at the time of the trespass, was admissible, to show *quo animo* the act was done, and to enhance the damages.⁵

§ 17. It is held that the jury, in trespass to personal property,

¹ *Hammat v. Russ*, 4 Shep. 171. See *Tarleton v. McGawley*, Peake, 205.

² *Warfield v. Walter*, 11 Gill & Johns. 80. See *M'Kinzie v. Baltimore*, 23 Md. 161.

³ *Haynes v. Thomas*, 7 Ind. 38. See *Tate v. Ohio*, 7 Ind. 479.

⁴ *Jewett v. Whitney*, 43 Me. 242. See 51 Me. 233.

⁵ *Ratliff v. Huntly*, 5 Ired. 545.

his own property; the plaintiff resisted such entry, and was assaulted by the defendant. Held, the action, for trespass *qu. cl.* and assault, was maintainable. *Huppert v. Morrison*, 27 Wis. 365.

Peaceable entry upon another's land, without the commission of any violence, and without a request and refusal to leave, does not justify a forcible expulsion. *State v. Woodward*, 50 N. H. 527.

A person specially authorized to serve a process has no other authority. He is entitled to no respect or obedience from one to whom his authority has not been made known. An owner of property, in ignorance thereof, resisting his seizure of it, is not a trespasser. *Leach v. Francis*, 41 Vt. 670.

Although a man may justify the force

necessary to defend possession of his house, lands, or goods, or his person, from threatened violence; he may not lead a riot to dispossess those who are unlawfully in possession under a claim of right. *State v. Yeaton*, 53 Me. 125.

And in general, the law does not justify violence in taking one's chattels. *Huppert v. Morrison*, 27 Wis. 365.

(a) This action is maintainable, though the damages cannot be accurately measured. *Gilbert v. Kennedy*, 11 Am. Law Reg. 599; 22 Mich. 5.

Evidence of any circumstances, which impart to the property a particular value to the owner, is admissible. *Burr v. Woodrow*, 1 Bush, 602; *Zimmerman v. Helser*, 32 Md. 274.

cannot increase the amount of their verdict for the plaintiff, by an allowance of counsel fees.¹ Nor, in an action of trespass for breaking and entering the dwelling-house of the plaintiff and doing other enormities to him, can he give evidence of an assault upon him.²

§ 18. One of the most important and frequent acts of trespass is the unlawful entry upon a party's *dwelling-house*. (a) A dwelling-house is defined as "a building inhabited by man."³ And a *door* is the place of usual entrance in a house.⁴ The general rule of law is, that an outer door cannot lawfully be broken, except in the service of criminal process, or of a *habere facias*.⁵ It is said, "A man's dwelling-house is his castle, not only for his own personal protection, but for the protection of his family and property therein. A defendant in an execution, by closing the outer doors of his dwelling against the sheriff, may prevent the latter from entering to make a levy on his goods."⁶ Thus in trespass, for breaking open the outer door of the plaintiff's dwelling-house, and entering therein, &c.; plea, justifying the entry generally under a *pluries fi. fa.*; demurrer, assigning for cause, that in the plea it was not averred that the outer door was open at the time the defendants entered under the writ: held, the plea was bad.⁷ So in trespass for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, &c.; pleas, first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. Replication (admitting the writ and warrant), *de injuriâ absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him. Held, first, that the averment in the plea, that the outer door was open, was a

¹ *Young v. Tustin*, 4 Blackf. 277.

² *Sampson v. Coy*, 15 Mass. 493.

³ *Bouv. Law Dict.*

⁴ *Ibid.*

⁵ *Ibid.*; 2 Tidd's Prac. 942.

⁶ Per Walworth, Ch., *Curtis v. Hubbard*, 4 Hill, 487.

⁷ *Buckenham v. Francis*, 11 Moo. 40.

(a) See *Foster v. Kelsey*, 36 Vt. 199. Entering a building or dwelling-house without license, express or implied, is a trespass, and entitles the owner to nominal damages. *Brown v. Perkins*, 1 Allen, 89; 12 Johns. 408.

Keeping an inn amounts to a general

license; and familiar intimacy may be evidence of a general license. *Adams v. Freeman*, 12 Johns. 408.

A mortgagee of chattels cannot lawfully enter a locked house to take them. *M'Leod v. Jones*, 105 Mass. 403.

material averment, this being a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, the defendants having become trespassers *ab initio* by the breaking of the door, that the jury were rightly directed, that they might (even on the plea of not guilty) give damages for all the injuries complained of in the declaration.¹ So, on the other hand, in trespass for breaking and spoiling a lock, bolt, and staple appertaining and fixed to the outer door of the plaintiff's dwelling-house, and wherewith the same was fastened; plea, that a *fi. fa.* issued against the plaintiff, and was delivered to the defendant, being a sheriff; by virtue whereof the defendant, then lawfully being in a room of the dwelling-house occupied by D as tenant to the plaintiff, peaceably entered into the residue of the dwelling-house, through the door communicating between the room and the residue, the same being then open, to take in execution the plaintiff's goods then in the dwelling-house, and did take them; and, because the outer door was shut and fastened with the lock, bolt, and staple, so that the defendant could not carry away the goods or execute the writ without opening the outer door, nor open the door without breaking the lock, &c.; and because neither the plaintiff nor any other on his behalf was in the dwelling-house, so that the defendant could request the plaintiff or such other to open the outer door, the defendant, for the purposes aforesaid, did open the outer door, and, in so doing, did necessarily break, &c., the locks, &c., doing no unnecessary damage. Held, on demurrer, that the plea was good, though it was not shown how the defendant entered into the house, nor who fastened the outer door; and that it sufficiently appeared that there was no other way of getting out.² (See § 21.)

§ 19. Where a person goes to the house of another, for the purpose of serving a *subpœna* upon him, and the latter is in the house at the time, these circumstances constitute a legal right to enter: and if the former finds the outer door open, and enters peacefully, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the *subpœna*; being liable only for an excess of violence, beyond what is necessary to overcome the resistance. And the fact, that the person having the process is ordered by the wife of

¹ Kerbey v. Denby, 1 M. & W. 336.

² Pugh v. Griffith, 7 Ad. & Ell. 827.

the party sought to be served to leave the house, will not render him a trespasser in proceeding to serve the subpoena.¹

§ 20. If a dwelling-house be capable of being used as a double house, or as a distinct residence for two families, each family having an outer door, and be thus used by the families of two persons; an officer, who has an execution against one, and enters the other's outer door by consent of the latter, has no authority to break open the door of the debtor's room, which adjoins a room of the other tenant, for the purpose of arrest. But if the door of the debtor's room be of common use and passage for the families of both, at the pleasure of both, either to go out of the house through the other tenant's outer door, or as a passage-way to the interior of the house; then such door is not privileged as an outer door, and the officer may lawfully enter it forcibly for the purpose of arrest.² And it seems that a sheriff's officer, acting under civil process, after demanding admittance, may justify breaking the inner doors of the defendant's house, though he be not therein at the time.³ In the execution of criminal process, in the case of a misdemeanor, it is necessary to demand admittance, before breaking the outer door. But it is doubted whether the same rule applies in the case of felony.⁴ And if a window be open, and a bailiff put his hand in and touch one against whom he has a warrant, he is thereby his prisoner, and he may break open the door to come at him.⁵ (a)

¹ *Hager v. Danforth*, 20 Barb. 16.

² *Stedman v. Crane*, 11 Met. 295.

³ *Ratcliffe v. Burton*, 3 Bos. & Pul. 223.

See *Hutchinson v. Birch*, 1 Taunt. 619.

⁴ *Launock v. Brown*, 2 B. & Ald. 592.

⁵ *Anon.*, 7 Mod. 8.

(a) So it seems goods may be distrained or taken in execution through an open window. 1 Rolle's Abr. 671. An officer, in executing a *ca. sa.*, put his hand into the debtor's dwelling-house, by an opening in a window, caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and said, "You are my prisoner." He was unable then to secure the debtor; but he thereupon broke open the outer door, and seized him. Held, the officer had acted legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the door being justifiable for the purpose of taking him into custody. *Sandon v. Jervis*, 1 Ell. Bl. & Ell. 935. See *Nash v. Lucas*, 8 Best & S. 531.

If one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal, and not

contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there, even though it be necessary to force the door. Thus the plaintiff, having the right to possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was temporarily absent from the house (for the day only), which he had fastened upon leaving, entered by forcing open the door, placed the furniture in the street, fastened up the house, and left it. The defendant, on returning, forced open the door, and re-entered and occupied the premises. Held, the plaintiff's entry was the exercise of a legal right in a legal manner, and he could maintain trespass *qu. cl.* against the defendant for his subsequent entry. *Mussey v. Scott*, 32 Vt. 82. See *Whittaker v. Perry*, 38 Vt. 107.

§ 21. In reference to the service of process, in connection with unlawful entry upon a dwelling-house; (a) as a general rule, no one can acquire by his own illegal act a right to the custody of another's person or property.¹ Therefore where, the outer door of a dwelling-house being latched merely, the sheriff entered it contrary to the known will of the owner, and levied upon his goods therein by a *fi. fa.*; held illegal, though the owner was not in the house at the time, and that the levy gave the sheriff no right to remove the goods. Also that even a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seized, using no more force than was necessary.² But, where the mortgagee of a house entered into it with an officer, by opening the outer door thereof in the absence of the mortgagor and his family, before the condition of the mortgage was broken, and without giving notice to the mortgagor to quit, and the officer by the mortgagee's direction attached the mortgagor's goods in the house; and the mortgagor brought an action of trespass against the mortgagee and the officer for breaking and entering the house and carrying away the goods: held, the action could not be maintained.³ And where a sheriff was lawfully in a room, occupied by an under-tenant of the plaintiff in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods under a *fi. fa.*; and, having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff, nor any one on his behalf, being present, whom the sheriff could request to open the door: held, he was justified in breaking the outer door and the lock thereof, in order to carry away the goods.⁴ (See p. 87.)

§ 22. Entry into a dwelling-house (b) is often justified by a

¹ Per Walworth, Ch., *Curtis v. Hubbard*, 4 Hill, 437.

² *Ibid.*

³ *Lackey v. Holbrook*, 11 Met. 458.

⁴ *Pugh v. Griffith*, 3 Nev. & Per. 187.

(a) If bailiffs break open doors to execute process, the party injured may have an action of trespass; but the court will not grant an *attachment* against them, unless it appear to have been in abuse of the process of the law. 6 Mod. 105.

One evicted under a legal warrant cannot claim damages against the rightful occupant, for causing the execution of the warrant and the removal of the plaintiff's goods during stormy weather, whereby the goods suffer injury. *Hicenbotham v. Lowenbein*, 3 Rob. (N. Y.) 22.

(b) Under a warrant in the usual form, on a complaint for larceny, the officer is authorized to break and enter the *shop* of the person accused, and seize the chattel alleged to have been stolen. *Banks v. Farwell*, 21 Pick. 156.

In a plea of justification under a search-warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month, and year, when it was exhibited, or that any recognizance for cost was given, or that the warrant was returned. Nor is it necessary to state the grounds of suspicion

search-warrant, or other similar process to be levied upon goods therein. And where an officer seizes goods on a search-warrant,

of the person praying out the warrant. *Chipman v. Bates*, 15 Vt. 51.

In an action for maliciously, and without probable cause, issuing a search-warrant to search the plaintiff's house, for goods alleged to have been stolen from the defendant; the judge charged the jury that, in his opinion, there would be sufficient to constitute probable cause, if they believed the facts given in evidence, and left it to them on the whole of the case to find whether there had been probable cause or not; and also directed them to find for the plaintiff, if they believed that there was any malice on the part of the defendant. Held, that the direction was right, and that, the jury having found for the defendant, the court could not interfere in granting a new trial. *Power v. Harrison*, 4 Irish L. R. 122.

Where the evidence, in an action of trespass *qu. claus.*, tended to prove, that the defendant entered the dwelling-house of the plaintiff by virtue of a search-warrant to find stolen goods, and after the search had been concluded, and the goods had been found and taken, together with the plaintiff, before the magistrate who issued the warrant, again aided others in entering the house for the purpose of finding evidence merely against the plaintiff to be used in convicting him of the theft; and the court instructed the jury that, if the defendant went to the house the second time merely for the purpose of finding more evidence against the plaintiff, and assumed, as a mere pretext, to go for some other purpose, the plaintiff was entitled to recover: it was held, that there was no error in the charge. And where it appeared, in such case, that, immediately previous to the issuing of the search-warrant, the defendant said, that "he had got a place fixed for Lawton," meaning the plaintiff, and the jury were instructed, that, if this was said by the defendant in reference to the prosecution, it could have no tendency to increase the damages, but that, if they believed the defendant went into the plaintiff's house merely to abuse and insult him, without any serious belief that he was guilty, it might be considered by them in estimating the damages, and the jury returned a verdict for the plaintiff; it was held, that herein there was no error. *Lawton v. Cardell*, 22 Vt. 524.

Under St. 1855 (of Mass.) c. 215, § 38, providing that "no action shall be had or maintained against any sheriff, deputy

sheriff, chief of police, or deputy chief of police, or constable, or their assistants, for executing any warrant or order issued under this act [concerning the manufacture and sale of spirituous and intoxicating liquors] by any justice or court competent to try the same; nor shall any action be had or maintained against an officer for seizing, detaining, or destroying any intoxicating liquor or the vessels containing it, unless such liquor and vessels were legally kept by the owner thereof;" an officer and his assistants cannot justify entering a building and seizing intoxicating liquors and vessels containing the same, which were illegally kept by the owner thereof, unless the officer had, and acted under, a warrant. *Hitchcock v. Baker*, 2 Allen, 431.

A search-warrant issued by a competent tribunal will protect an officer who acts under it, although founded on an insufficient complaint. *Dwinnels v. Boynton*, 3 Allen, 310.

An officer may lawfully serve a search-warrant, which refers to an annexed complaint, on which it is founded, for a description of the place to be searched, and the property to be searched for. *Ibid.*

A complaint which alleges, that "three cases of misses' and women's boots, of the value of one hundred dollars; a lot of oak tanned soles, of the value of fifty dollars; and ten sides of sole leather, of the value of forty dollars," have been stolen, contains a sufficient description of the property to authorize the issuing of a search-warrant, and to justify an officer in making search therefor, under a warrant which refers to the complaint for a description of the goods. *Ibid.*

A search-warrant describing the place to be searched as "the dwelling-house of P. D., mentioned in the above information," which is annexed, and in which the place to be searched is described as "the dwelling-house of P. D. of R., in said county," will protect an officer who acts under it in searching the dwelling-house of P. S. D., in R., if that is the place intended to be searched, and there is no person in the town by the name of P. D. *Ibid.*

An officer who serves a search-warrant, which commands him to search a dwelling-house therein described, for sole leather and other goods, is not rendered a trespasser *ab initio*, merely by taking and examining a case of "uppers" found in the house, and laying them down again, although they were not specifically

which correspond with and come within the description of those for which he is commanded by the warrant to search; he is not liable to an action, though the goods so seized by him may not be the same which were lost by the complainant.¹ (a) And, in trespass for searching the plaintiff's house *without warrant*, circumstances of reasonable suspicion, that implements or evidences of crime are there concealed, may be given in evidence in mitigation of damages.² But where no goods are found upon a search-warrant, the person upon whose oath the warrant was obtained will be liable in trespass.³ But if the officer enters the dwelling-house of the person against whom the process issues, the door being open, and without any unnecessary damage, to execute the same; the owner of the house cannot maintain trespass against the party who prays out the process, although the goods were not found.⁴

§ 23. *Arrest of the body*, as well as seizure of property, may also be set up as a justification for such entry. Thus an officer acting *bonâ fide* may break and enter another's dwelling-house to arrest him on a criminal charge, although in the mistaken belief that such person is in the house at the time, provided he first requested an entrance, and be guilty of no unnecessary damage or violence.⁵ But in a plea of justification by the sheriff, to an action for breaking the plaintiff's house, and breaking open the inner doors, it is

¹ *Stone v. Dana*, 5 Met. 98.

² *Simpson v. McCaffrey*, 13 Ohio, 508.

³ *Reed v. Legg*, 2 Harring. 173.

⁴ *Chipman v. Bates*, 15 Vt. 51.

⁵ *Barnard v. Bartlett*, 10 Cush. 501.

mentioned in the warrant, and he knew they were not, if in so doing he acted in good faith; or by searching a shop without license, before searching the dwelling-house. *Ibid*.

A constable, in levying a distress-warrant, has no right to force open an outer door or window which is fastened, though he breaks no lock. *Jewell v. Mills*, 3 Bush, 62.

A distress is not unlawful, because the distrainer climbed a fence to get upon the premises. *Eldridge v. Stacy*, 15 C. B. N. S. 458.

A person properly in possession of premises for the purpose of making a distress, if forcibly expelled, may regain possession by force. *Ibid*.

(a) See *Kent v. Willey*, 11 Gray, 368. In trespass for breaking and entering the plaintiff's house, and continuing therein from, &c., till the commencement of this suit; the defendant, as to the continuing in the house for a part of the time, "to

wit, for the space of two days," justifies as sheriff under a *fi. fa.* issued against the goods of T. K., deceased, in the hands of the plaintiff's wife, as administratrix, to be administered; and that, having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and stayed therein for the space of time in the declaration mentioned, the same being a reasonable time in that behalf. The replication alleges, that the two days mentioned in the plea were an unreasonable length of time for the defendant's searching for the goods; and then new assigns. Held, on special demurrer, first, that the replication was bad, in having tendered an immaterial issue, and also as being double; secondly, that the defendant was justified in entering the plaintiff's house, by his belief that the goods were there, though that belief were not justified by the event. *Cooke v. Birt*, 1 Marsh. 333.

not sufficient to allege, that he entered under a *capias* against one A B, the outer door being open ; and that, the rooms in the house being fastened, and having reasonable suspicion that A B was therein, the defendant broke open the same ; without averring that A B was actually in the house, or that there was a previous demand of admittance ; the sheriff being justified, or not, in entering the house of a stranger, by the event.¹ So a plea, justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.²

§ 24. As already stated, the privilege connected with a dwelling-house, and the doors of such house, furnishes no protection against the execution of a writ of *habere facias*, the very precept and purpose of which is, to give possession to a judgment plaintiff of such house belonging to the judgment defendant. It is the duty of an officer, in the execution of such writ, to deliver actual and quiet possession ; and for this purpose to remove (using no more force than is necessary) all persons, especially if they claim under the judgment defendant. Hence he may enter by breaking a door which is fastened, without demand of admission, although there are persons then in the house ; provided they are there for the purpose of holding possession by force, and of opposing the officer in the execution of his precept, and it does not appear that he knew, or had any cause to suppose, that any person was in the house. And where an officer, in the execution of a writ of *habere facias possessionem* of an undivided part of a house, entered, and, by the direction of the owners of the other parts, who were also the assignees of the judgment, forcibly removed from the house a person entering without right after the entry of the officer ; held, the officer was justified, both by the order of such owners, and by the authority of his writ.³

§ 25. Another important inquiry, in connection with the privileges incident to a dwelling-house, arises in the case of personal violence, committed by the possessor or the alleged owner, each upon the other, in attempting to regain or to hold possession of such dwelling-house. (See chap. 4, § 12 ; chap. 5.) It is held, that a plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge for striking the plaintiff repeated blows,

¹ Johnson v. Leigh, 1 Marsh. 565.

² Smith v. Shirley, 3 Com. B. 142.

³ Howe v. Butterfield, 4 Cush. 302.

and with great force and violence knocking her down several times.¹

§ 26. In an action for assault and battery committed upon the plaintiff in his dwelling-house, to a plea that the assault and battery were committed in defence of the possession of a dwelling-house, of which the defendant was seized and possessed, the replication *de injuriâ*, &c., is sufficient.² But if the defendant pleads, that the first assault was committed by the plaintiff, and the plaintiff replies, that the defendant broke open the dwelling-house of the plaintiff, and beat him, and that he, in defending himself against the defendant, gently laid his hands on the defendant, which was the same assault in the plea mentioned, concluding with a verification: the replication is bad, inasmuch as it does not aver distinctly, whether the plaintiff or the defendant made the first assault; and, if it means the former, it ought to have confessed and avoided in direct and unambiguous language; if the latter, it ought to have contained a general traverse, concluding to the country.³

§ 27. In trespass for assault and battery committed upon the plaintiff in his dwelling-house, the defendant cannot justify, on the ground that he was owner of the house, that the possession was unlawfully withheld from him, and that he used no more force than was necessary to enable him to enter, and to overcome the plaintiff's resistance. And where it appeared that the plaintiff lived in the same house with his son and son's wife, that the defendant broke open the house and beat the plaintiff and his son, that the son's wife was in travail, and that this fact was made known to the defendant before he entered the house: held, the situation of the son's wife was properly admitted in evidence, to show the malice of the defendant, and the aggravated suffering of the plaintiff, although it was not set forth in the declaration; but that the circumstance, that the defendant entered the house for the purpose of making an attachment, was not admissible in evidence in mitigation of damages.⁴

¹ Gregory v. Hill, 8 T. R. 299; acc. Cro. Eliz. 242.

² Flagg v. Flagg, 11 Pick. 475.

³ Sampson v. Henry, 11 Pick. 379.

⁴ Ibid.

CHAPTER XXV.

CONVERSION.

1. What constitutes conversion and the foundation of an action of *trover*; unlawful taking, misuse, &c.

4. Conversion in case of *bailment*.

6. Goods obtained by *threats, fraud, or mistake*.

7. Breach of trust.

8. But there must be a conversion to one's own use; not mere negligence or other wrong.

11. Conversion in case of legal process.

12. Demand and refusal, when sufficient proof of conversion.

18. When insufficient; inability of the defendant to deliver the property; doubt of the plaintiff's title; detention by legal authority, &c.

15. Nature of the property converted; real estate; choses in action, &c.

19. Parties.

22. Pleading.

27. Damages.

§ 1. ANOTHER injury to property is *Conversion*. The conversion, by one man, of another's property *to his own use*, is of course involved in a considerable proportion of the wrongs to property which we have occasion to consider; but it is also of itself constituted by the law a specific wrong, and made the subject of a special action, to wit, the action of *trover* — the French word for *find*. And it may be remarked in general, that, as the two propositions, *a trespass is committed*, and *an action of trespass may be maintained*, have the same legal signification; so, in all instances of conversion, *trover* may be brought, and, wherever *trover* lies, there has been a *conversion*. With reference to the action of *trover*, it is said, "In form, it is a fiction; in substance, it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes that the defendant might have come lawfully by it, and, if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2d, a wrongful conversion by the defendant."¹

§ 2. It has been already sufficiently explained — chapter 18 — that, to maintain *trover*, *property* — usually proved sufficiently by *possession* — must be shown in the plaintiff. We now proceed to

¹ Per Lord Mansfield, *Cooper v. Chitty*, 1 Burr, 31; 1 Bl. R. 67.

explain the still more distinctive requisite of a *conversion* by the defendant.¹ (a)

§ 3.. It was formerly held, that trover supposes a lawful coming by the goods demanded, and an unlawful conversion; as on the other hand detention against lawful demand presumed conversion.² (b) But the prevailing doctrine now is, that conversion may be inferred from the taking of property, and the neglect to return it;³ (c) and that trover may be maintained for *taking* goods, whenever trespass will lie;⁴ (d) that not only a wrongful deten-

¹ See *Mires v. Solebay*, 2 Mod. 242; *Warren v. Milliken*, 57 Me. 97; *Sherman v. Way*, 56 Barb. 188; *Carroll v. M'Cleary*, 19 Mich. 93.

² *Golightly v. Reynolds*, Lofft, 88.

³ *Stickney v. Smith*, 5 Minn. 486.

⁴ *Glenn v. Garrison*, 2 Harr. 1; *State v. Patten*, 49 Me. 383.

(a) See *Jeffries v. Great, &c.*, 34 Eng. L. & Eq. 122; *Green v. Clarke*, 2 Kern. 343; *Andrews v. Shattuck*, 32 Barb. 396. A special verdict in trover must expressly find the conversion. *Stone v. Waggoner*, 3 Eng. 204.

A demand will not be effectual, unless there is a title in the plaintiff, and possession on the part of the defendant. *Beckman v. M'Kary*, 14 Cal. 250.

(b) It seems to have been the ancient rule, that a demand was necessary to trover. *Termes de la Ley*, 567. And see *Donohue v. Henry*, 4 E. D. Smith, 162.

Two parties exchanged horses; the defendant warranting his horse sound, and granting the privilege of returning her after trial, if she proved otherwise. She proved unsound, and the plaintiff in a few days returned her and demanded his own, which the defendant refused. Held, the plaintiff had a right to rescind the contract, and therefore the refusal was a conversion. *Miller v. Grove*, 18 Md. 242.

(c) As where wood was one day in the plaintiff's possession, and two days afterwards was found in the unexplained possession of the defendant in his yard. *Thomas v. Steele*, 22 Wis. 207.

(d) Where a party becomes possessed of the property of another, for instance, of a wagon, and changes part of its appendages, by substituting whiffletrees and clevises for those attached to it when it came into his possession; and the owner repossesses himself of the wagon, without knowledge of the change in its appendages: trespass cannot be maintained against him for the substituted articles; the remedy of the party, if any, is by action of trover. *Parker v. Walrod*, 13 Wend. 296.

"If a man's goods are taken by an act

of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain *trespass* for the forcible injury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had and received." *Rodgers v. Maw*, 15 M. & W. 448.

The distinction between trover and trespass is well illustrated by the following remarks, in a case where a ferryman wrongfully put the horses of a passenger out of the boat, without further intent concerning them; and it was held, that, although the act might be a trespass, it was not a conversion: "Any asportation of a chattel for the use of the defendant or a third person, is a conversion, because it is inconsistent with the general right of dominion which the owner has in the chattel. So, if a man has possession of my chattel, and refuses to deliver it when required, that is evidence of a conversion, because there is an assertion of right inconsistent with my right of general dominion over it. So of the destruction of a chattel, the effect of which is, to deprive the owner of it altogether. But if an act is done, which does not call in question my general right of dominion over the chattel, but on the contrary, recognizes it, that is no conversion. In the present case, why were the horses removed? Was it not because they were the property of the plaintiff? The act of removal was consistent with the plaintiff's right to use them. It may be a wrongful act, for which trespass is maintainable, but it is not a conversion. A trifling injury to a carriage would be a trespass, but it would be monstrous to say, that it would form the ground of an action of trover." Per Alderson, B., *Fouldes v. Willoughby*, 1 Dowl. P. C. N. S. 86.

tion, after demand, but an unlawful taking of the goods of another, with intent to convert them to the use of the taker, or a wrongful assumption of property, without manual taking or removal, if there is an attempt to dispose of them, and without demand or offer to pay charges, is itself a conversion, and not merely evidence of it.¹ So also the *misuse* of a thing, (a) or the using of a thing without the license of the owner, or a *wrongful sale* of it.² (b) Thus if a person hires a horse to go to a certain place and drives him

¹ See *Davis v. Taylor*, 41 Ill. 405; *Robinson v. Hartridge*, 13 Flor. 501; *Gilman v. Hill*, 36 N. H. 311; *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123; *Clark v. Whitaker*, 19 Conn. 319; *M'Pherson v. Neuffer*, 11 Rich. 267; *Harker v. Dement*, 9 Gill, 7; *Dudley v. Sawyer*, 41 N. H. 326; *Webber v. Davis*, 44 Me. 147; per *Parker, C. J.*, *White v. Phelps*, 12 N. H. 385-386; *Robinson v. Skipworth*, 23 Ind.

311; *Farrington v. Payne*, 15 Johns. 431; *Brown v. Beason*, 24 Ala. 436; *St. John v. O'Connell*, 7 Port. 466; *Pharis v. Carver*, 13 B. Monr. 236; *Maguyer v. Hawthorne*, 2 Har. 71.

² *Neal v. Hanson*, 60 Me. 84; *Chapin v. Siger*, 4 McLean, 378; *Hotchkiss v. Hunt*, 49 Me. 213; *Maguyer v. Hawthorne*, 2 Harring. 71; *Woodbury v. Long*, 8 Pick. 543.

(a) The plaintiff sent to the defendant, who was cashier of a bank, and then at the bank, a sum of money for a special purpose. The defendant received the money, knowing the purpose, and immediately misapplied it. Held, he was personally liable for the money and interest, whether applied to his own use or that of the bank. *Norton v. Kidder*, 54 Me. 189.

(b) Goods taken in the owner's lifetime, and used after his death, are converted in his lifetime. *Crossier v. Ogleby*, 1 Strange, 60.

In many cases the question of wrongful appropriation of property, so far as the right or title of the true owner is concerned, depends in part upon his *knowledge* of the unlawful interference. But, with reference to the *conversion* of personal property, it is held, that the Statute of Limitations is a bar to an action of trover commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period. *Granger v. George*, 5 B. & C. 149.

In late cases it is held, that, upon the question of conversion the only point is, whether the defendant applied to his own use the property of another without his permission, and without legal right. His motives or his knowledge with reference to the right of such owner are of no importance. *West v. Trenton*, 3 Vroom, 517; *Morris v. Moulton*, 40 Vt. 242. See *Johnson v. Powers*, Ib. 611.

Under some circumstances, however,

the fact of notice may be material. If one in possession of property, as apparent owner, sell it, trover does not lie in favor of the true owner against the purchaser, unless the latter assume dominion over the property, after notice of the plaintiff's title. *Parker v. Middlebrook*, 24 Conn. 207.

A took and carried away iron ore from the land of B, under a claim of right, and B took a bond from A to pay the value of the ore, if finally determined to be B's property. Held, the bond was a bar to an action of trover by B against one who had purchased it of A; and the only remedy was on the bond. *Briggs, &c. v. North, &c.*, 12 Cush. 114.

One who purchases or hires property, with notice of an adverse claim of title, though no suit has been brought, takes subject to such claim; and where a bailee, with such notice, carries off the property, by the direction of the bailor, he is answerable to the owner in whose favor a suit has since been decided. *McAnelly v. Chapman*, 18 Tex. 198.

If a purchaser of goods in satisfaction of a debt be informed by any means sufficient to put him on inquiry, and this without demand, that his debtor hold the goods only as factor, his subsequent taking them away is a conversion. *Scriber v. Masten*, 11 Cal. 303.

But no action lies against one, who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement. *Folley v. Lennox, &c.*, 2 Allen, 182.

further, it is a conversion, and the hirer is liable for all damages subsequently occurring, although arising from the fault of the horse.¹ It is said, that a "person is guilty of a conversion who intermeddles with my property and disposes of it."² And that trover "only lies, where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion."³ So, "there must be an intention of the defendant to take to himself the property in the goods, or deprive the plaintiff of it. If the entire article is destroyed, as for instance by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use."⁴ And simple *possession*, with a claim of title adverse to that of the true owner, is held sufficient evidence of *conversion*.⁵ Thus no demand was necessary, in trover, where the defendant had employed a slave, for some time previous to the suit, in the ordinary domestic avocations, and, upon the trial, asserted a title in himself.⁶ So where, in trover for a slave, the plaintiff proved that the defendant, a negro-dealer, purchased the slave in dispute of the plaintiff's mother, knowing that she had but a life-estate in him, and had possession of the slave a few days afterwards; held error, for the court to instruct the jury, that the plaintiff had not made out a *prima facie* case.⁷ So taking the property of another by assignment, from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased there in his own name for his principal; and refusing to deliver it to the principal after notice and demand by him; none other than the person in whose name it is warehoused being able to take it out: is a conversion.⁸ (a)

¹ Lucas v. Trumbull, 15 Gray, 306.

² Per Lord Ellenborough, Stevens v. Elwall, 4 M. & S. 261; acc. Fuller v. Ta-
bor, 39 Me. 519.

³ Per Maule, J., Heald v. Carey, 11
Com. B. 993.

⁴ Per Parke, B., Simmons v. Lillystone,
8 Exch. 442.

⁵ Maxwell v. Harrison, 8 Geo. 61. See
Alderman v. Chester, 34 Geo. 152.

⁶ Powell v. Olds, 9 Ala. 861.

⁷ Speed v. Heisin, 4 Mis. 356.

⁸ M'Combie v. Davies, 6 E. 538; Ca-
rey v. Bright, 58 Penn. 70; Sprights v.
Hawley, 39 N. Y. 441.

(a) The defendant receipted to the plaintiff for three shares of stock, "to sell for him on commission," which the defendant exchanged for other property. Held a conversion, without proof of demand. Haas v. Damon, 9 Iowa, 589.

A sold an engine-lath to B, taking back a mortgage, which contained a covenant for possession by the mortgagor until breach of condition, and delivered the machine to a carrier, to be taken to the town of B's residence. B on the same

§ 3 *a*. More especially a *purchase* of property, from one who has no power to sell, where the purchaser takes a delivery of it, and retains the possession, claiming it under the sale, is a conversion of it.¹ So where a defendant, after the accrual of the plaintiff's title and right of possession, having the property in his own hands by purchase from one who had no title, sold it to another, who carried it beyond the plaintiff's reach, and received the purchase-money; it was held a sufficient conversion, although the defendant was not aware of the plaintiff's title.² So trover lies against a mortgagee, who claims under a pretended sale.³ So, without demand, against a purchaser from an administrator who sells under an order not within the jurisdiction of the court.⁴ So where the defendant, in the absence, and without the consent or knowledge, of the plaintiff, personally took possession of his house, which had been kept by him as a public hotel and boarding-house, and of the barn belonging to it, and of the property in those buildings, of which the plaintiff was the owner, consisting principally of furniture and provisions suitable for such an establishment; set up and carried on therewith the same business, in his own name, and on his own account; employed clerks and agents for that purpose; took down the sign of the plaintiff, and substituted his own; used and consumed a portion of the property; mingled it with similar articles which he procured for the concern; and, in his own name, also sold and disposed of the remainder, and appropriated the avails to his own use and benefit; and treated the property, in all respects, as if it belonged only to himself: it was held, that these acts constituted a conversion.⁵ So goods were consigned to order, and one of the bills of lading was indorsed by the shipper, who was agent of the owner of the

¹ *Hyde v. Noble*, 13 N. H. 494.

² *Harris v. Saunders*, 2 Strobb. Eq. 370.

³ *Clark v. Rideout*, 39 N. H. 238.

⁴ *Hall v. Chapman*, 35 Ala. 553.

⁵ *Clark v. Whitaker*, 19 Conn. 319.

day pledged the machine to C, and promised to have it sent to him on its arrival. The next morning C went to the carrier, and directed a teamster to take it home, which he did on the same day. After this order, but before the delivery, A recorded his mortgage. C afterwards sold and delivered the machine to another person, and, on A's demanding it, answered that he had sold it, and did not know where it was, and refused to assist A in finding it. Held, sufficient evidence of title in A and conversion by C to sup-

port trover. *Chamberlain v. Clemence*, 8 Gray, 389.

The minor son of an owner of a certificate of stock, with a power of attorney in blank indorsed thereon, tortiously transferred it to the clerk of the defendant, and the defendant afterwards directed its sale, and, deducting a commission for his services, paid over the balance to the clerk. Held, the defendant was liable to the owner of the stock for the conversion, even although he acted in good faith. *Anderson v. Nicholas*, 5 Bosw. 121.

vessel and goods, and was forwarded by the plaintiff, the master of the vessel, to the defendant, who, on the arrival of the goods, had no other right to them. After the arrival of the goods, the owner indorsed the duplicate bill of lading to the plaintiff, and mortgaged the goods to him. The defendant entered the goods at the custom-house, as owner, in opposition to the plaintiff's attempt to enter them, and took them from the vessel under a custom-house permit, the plaintiff being on board, and claiming the goods as his own. Held, a conversion.¹ So one J. advised the plaintiffs, that he had remitted to them \$1969, consigned to L. L. received \$4700, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of England, where they were deposited for safe custody, on a sale of them to the bank. Held, that the letter was a sufficient appropriation of the dollars to the plaintiffs; that the plaintiffs and defendant were not tenants in common of the dollars; that, although no specific dollars had been severed for the plaintiff, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiff's share; and that, although the dollars remained in the same unaltered custody, yet the delivery by the defendant of the bill of lading, which was the symbol of them, and the receipt of the value, was a conversion.²

§ 3 *b*. And a party may be held liable for the conversion of the whole of certain property, of which he has misappropriated only a part. Thus if a person finds a raft of timber on a sand-bar in a navigable river, high and dry, and takes possession of it, and assumes to dispose of it, hires a person to assist him in removing a part, and sells that person his interest in the remainder, reserving to himself the portion removed; it is a conversion of the whole.³ So drawing part of the liquor from a vessel, and filling the vessel up with water, was held to be a conversion of all the liquor.⁴ So the defendant, under pretence that he wanted the plaintiff to do his threshing, induced him to move his threshing-machine into the defendant's barn. He then claimed the wheels upon which it was transported, but which belonged to a wagon that the plaintiff had borrowed for the season, to use with the machine. The jury having found against his right to detain the wheels: held, a conversion of the machine, as well as of the wheels; upon the ground that the detention of the wheels brought upon

¹ *Bray v. Bates*, 9 Met. 237.

² *Jackson v. Anderson*, 4 Taunt. 24.

³ *Gentry v. Madden*, 3 Pike, 127.

⁴ *Richardson v. Atkinson*, 1 Strange, 576.

the plaintiff a charge in respect to the machine; compelling him to leave it at the barn, until he could procure other wheels to take it away.¹

§ 4. Upon the general principle already explained, that, if one legally in possession of the personal property of another misuse that property, it is a conversion, and the owner may immediately maintain trover;² the question of conversion often arises between *bailor and bailee*. (a) Upon this subject it is held, that, if a chattel be *gratuitously* left with a person, damages for conversion are not recoverable until demand.³ But a bailee of goods for hire, by selling them, determines the bailment. And the bailor may maintain trover against the purchaser, though the purchase was *bond fide*.⁴ Thus the sale by a warehouseman of grain deposited with him for storage, without notice to the owner, is a conversion, though claimed to be rendered necessary by the inroads of insects.⁵ So a wrongful sale or lease of property by a bailee is a conversion in both the seller and the purchaser (though acting in good faith), for which the bailor may maintain trover against either or both.⁶ (b) So if a mortgagor of personal property, or any one claiming under him; sell the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion, and the mortgagee may maintain trover.⁷ Though such action cannot

¹ Bowen v. Fenner, 40 Barb. 383.

² Ripley v. Dolbier, 6 Shep. 382.

³ Polk v. Allen, 19 Mis. 467.

⁴ Cooper v. Willomatt, 1 Com. B. 672.

⁵ Jordan v. Shireman, 28 Ind. 136.

⁶ Buckmaster v. Mower, 21 Vt. 204; Crocker v. Gullifer, 44 Me. 491.

⁷ White v. Phelps, 12 N. H. 382.

(a) See *Boothe v. Estes*, 16 Ark. 104. It has been held that trover lies on a count on a bailment, where there is an unlawful detention; even if no bailment is proved. *Marriam v. Yeager*, 2 B. Monr. 339.

(b) In a recent case the distinction is made, that a bailee *at will*, and a bailee in whom a personal confidence is reposed, have no assignable interest; and any sale by them passes no property, but puts an end to the bailment, and the bailor may bring trover or trespass against the purchaser who takes the property. But a hirer of property *for a term*, or a bailee who has a *lien* upon the property, may have an assignable interest in it, and, though his sale of the property absolutely will put an end to the bailment, yet a transfer of his interest merely will convey such interest. Thus if A sell to B on condition that the property remain A's till payment for it; if B, before payment, sell to C, subject to A's claim, C acquires the same rights to the property as were held

by B, and on tender of the price the property becomes his. *Bailey v. Colby*, 34 N. H. 29.

"If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." Lit. § 71. And Lord Coke adds, "The reason is, that, when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may bring an action of trespass on the case for the conversion, at his election." *Clark v. Gilbert*, 2 Scott, 520.

Where the contract of bailment was, that upon a certain contingency the bailee was to account to the bailor for the property; and upon legal demand the bailee refused to deliver the property, disputed the bailor's right to it, and offered in no way to account for it: the bailor may bring trover. *Estes v. Boothe*, 20 Ark. 583.

be maintained by a second mortgagee against a purchaser to whom a first mortgagee, entitled to the possession, has sold the entire property.¹ So where the vendee of personal property, under a conditional sale, sells it without performing the condition, his vendor may maintain trover against the second purchaser, without a demand and refusal.² So the action for conversion lies against the *bonâ fide* purchaser of furniture from one to whom the owner delivered it on condition not to sell or remove it till paid for; though before a demand the defendant had parted with the furniture.³ And a wrongful *use* of property by a bailee is a conversion. Thus where A hired his slave to B, with a special agreement that he should not be employed "in or about the water;" it was held, that the employment of the slave "in or about the water," was a conversion, and, the slave being subsequently destroyed by inevitable accident, that B would be liable in trover, though no injury occurred at the time of the conversion.⁴ And, in general, where a hired slave was accidentally lost, while engaged in an employment to which the bailee had no right to put him, it amounted to a wrongful conversion by the bailee.⁵ So where the defendant borrowed a carriage of the plaintiff to use in a particular place, and sent it heavily loaded to another place, whereby the carriage was damaged; it was held a conversion.⁶ So if an infant take property wrongfully, this is an actionable conversion; and, if it be bailed to him, and he use it for a different purpose from that for which it was bailed, the bailment is determined, and he is liable in trover.⁷ So where one hires a horse to go an agreed distance, and voluntarily goes beyond that distance, he is liable for a conversion, as well as for any injury to the horse, though occurring without his fault.⁸ Even, it is held, though the horse was let on Sunday, in violation of a statute.⁹ (a) (See vol. i. p. 173.) And it is not necessary that the owner should tender back the money received for the hire of the horse.¹⁰ So where the plaintiff delivers his horse to another, to be kept

¹ Landon v. Emmons, 97 Mass. 37.

² Whipple v. Gilpatrick, 1 App. 427.

³ Carter v. Kingman, 103 Mass. 517.

⁴ Horsly v. Branch, 1 Humph. 199;

Wentworth v. M'Duffie, 48 N. H. 402;

Crocker v. Gullifer, 44 Me. 491.

⁵ Spencer v. Pilcher, 8 Leigh, 565.

⁶ Hart v. Skinner, 16 Vt. 138.

⁷ Green v. Sperrey, 16 Vt. 390.

⁸ Wheelock v. Wheelwright, 5 Mass. 104; Fish v. Ferris, 5 Duer, 49; Disbrow v. Tenbroeck, 4 E. D. Smith, 397.

⁹ Woodman v. Hubbard, 5 Fost. 67.

¹⁰ Disbrow v. Tenbroeck, 4 E. D. Smith, 397.

(a) If the owner of the horse receives payment for the whole distance travelled, he thereby ratifies the act of the hirer, so that trover will not lie; but, if the hirer

has injured the horse by ill usage, the remedy is an action on the case. Rotch v. Haines, 12 Pick. 136.

until a note given for the price becomes due or is previously paid ; and before the time of payment the horse is sold to the defendant by the bailee, without notice of the plaintiff's claim ; and the defendant, after notice of such claim, continues to use and claim the horse as his own after the time limited for the payment of the note : this amounts to a conversion, and the plaintiff may maintain trover without a demand.¹ So if one in possession of property pledges it without authority, it amounts to a conversion, and the pledgee is liable to the owner in trover, whether he was aware of the real state of the title or not.² So if chattels are pledged without authority by a person to whom they have been entrusted by the owner for a special purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights, in trover, after a demand by such purchaser : although he has sold the chattels since the first demand, and before the second.³(a) So one holding goods, with a lien for charges and expenses, is liable to an action for conversion, after an offer of payment and demand for the goods, unless he state the amount of his claim, and offer to surrender the goods upon payment.⁴(b)

§ 4 a. But an unauthorized use of property by the bailee is sometimes held not a conversion, unless injury is caused thereby.

¹ Porter v. Foster, 7 Shep. 391.

² Thrall v. Lathrop, 30 Vt. 307 ; Ogden v. Lathrop, 1 Sweeny, 643 ; Hutton v. Arnett, 51 Ill. 198.

³ Carpenter v. Hale, 8 Gray, 157.

⁴ Wagenblast v. M'Kean, 2 Grant, 393.

(a) An action for conversion lies in favor of the maker of a note against the payee, who surrenders collateral security given him by the maker. *Greenwald v. Metcalf*, 28 Iowa, 363.

Where a person employed by a bank took the bonds of the depositor from their place of deposit in the bank, and sent them out of the State, to be used as collateral security for the taker's own debt ; held, a fraudulent conversion, within the meaning of (Mass.) Gen. Sts. c. 161, § 39, although at the time of the taking he expected to restore them to the bank before they should be missed. *Com. v. Tenney*, 97 Mass. 50.

(b) The point under consideration has often arisen in connection with slaves. Where one, having hired a negro to work on his farm, employed him on a steamboat, the negro being drowned, he was held responsible. *Richardson v. Dingle*, 11 Rich. 405 ; acc. *Fail v. McArthur*, 31 Ala. 26.

The owner of a slave put him on board a steamboat, for transportation for hire. To prevent accident or escape, he tied him to a post on the boat. The master of the boat, for the purpose of getting the service of the slave at the pump, without any necessity of urgent character and without the owner's consent, untied him, and afterwards let him go about the boat, with his arms tied. In consequence of this the slave was lost. Held, without reference to what the owner would have done if then present, the master of the boat was liable for a conversion of the slave ; there being no subsequent waiver or ratification of these acts. *Scruggs v. Davis*, 5 Sneed, 261.

If a tenant of slaves for life sold the absolute estate in them to a slave-trader to the southern market, this was a conversion. *Coffey v. Wilkerson*, 1 Met. (Ky.) 101.

Thus, where the defendant had the plaintiff's horse for agistment and feeding, and rode him fifteen miles, and the horse died immediately after, but not in consequence of the riding; this was held not a conversion.¹ And if A sell to B sheep, that B had before leased to A, and at the time of the sale B knew that they were the same sheep he had leased A; it is not a conversion of the sheep so sold, and B cannot maintain trover against A for the sheep.²

§ 5. The precise time, at which conversion of property in the hands of a bailee may occur, is sometimes brought in question, in connection with *the Statute of Limitations*. Thus to an action of trover for wine, commenced October, 1833, the Statute of Limitations was pleaded. The wine, in pipe, had been deposited by C, for the plaintiff, in the defendant's cellar, by her leave. C became a bankrupt, and, his assignees claiming the wine, the plaintiff's solicitors warned the defendant, by letter, in December, 1826, not to give it up to any person unauthorized by them. The defendant kept the wine and bottled part of it, at or soon after the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when, she consumed part of the wine so bottled. In November, 1827, the plaintiff's solicitors again wrote to the defendant, saying that they were instructed to proceed at law against her, and referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding March, but of which there was no further evidence. They also offered to indemnify her against the claim of any other person, if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand and refusal were proved. The jury having found for the plaintiff; held, on motion to enter a nonsuit, that on this evidence the jury were not bound to conclude, either that there had been a demand and refusal more than six years before action brought, or that the defendant had bottled the wine with intent to convert it to her own use.³ (a)

¹ Johnson v. Weedman, 4 Scam. 495.

² Downer v. Rowell, 24 Vt. 343.

³ Philpott v. Kelley, 3 Ad. & Ell. 106.

(a) See, as to conversion by a bailee, Harvey v. Epes, 12 Gratt. 153. One coming into possession of property by agreement, and afterward selling it according to the agreement for the sole use and benefit of the owner, cannot be guilty of conversion of such property. But if the proceeds

thereof be in money, and he refuse to pay it over on reasonable demand, or according to the terms of the agreement, he will be liable for so much money had and received; or, if the proceeds are other property, upon a like refusal, he will be held guilty of a conversion of such proceeds,

§ 6. Where one induces another to enter into a contract and part with his property, either by duress of imprisonment or duress *per minas*, the transaction is void, and no title passes; (*a*) and a party who assumes the control of property, obtained by him in this way, is liable to the owner in trover, without any previous demand.¹ So if one in good faith purchase and subsequently sell stolen goods, he is liable in trover to the owner, without a demand and refusal.² So *fraud* in obtaining goods is held to dispense with a demand and refusal;³ as well in an action against one having notice of, and more especially one participating in, the fraud, as the original purchaser himself.⁴ Thus, if goods are procured by fraud under color of a purchase, and are received by a third person with notice of the fraud, or under circumstances sufficient to put him on inquiry; or if he fails to put himself on the footing of a *bonâ fide* purchaser for a valuable consideration: he is guilty of a conversion, as to the original owner. And this, although before he received the goods the owner took no steps, or made known his determination, to reclaim them; and might acquiesce in the fraud, and abandon his right to treat the sale as a nullity and reclaim the goods.⁵ So the assignee of an insolvent debtor

¹ *Foshay v. Ferguson*, 5 Hill, 154. See *Taylor v. Jaques*, 106 Mass. 291; *Osborn v. Robbins*, 36 N. Y. 365; *Jones v. Rogers*, 36 Geo. 157; *Cunningham v. Pitzer*, 2 W. Va. 264; *Bosley v. Shanner*, 26 Ark. 280;

Knapp v. Hyde, 60 Barb. 80; *Phelps v. Zuschlag*, 34 Tex. 371.

² *Courtis v. Kanes*, 32 Vt. 232.

³ *Tallman v. Turck*, 26 Barb. 167.

⁴ *Luckey v. Roberts*, 25 Conn. 486.

⁵ *Gage v. Epperson*, 2 Head, 669.

and will be liable in damages. *Chase v. Blaisdell*, 4 Minn. 90.

It is not a conversion, but a mere breach of duty, for an agent, intrusted with property to sell at a certain price, to sell it at a less price. *Moore v. McKibbin*, 33 Barb. 246.

For the vendee of a slave, upon the improper refusal of the vendor to receive her back and rescind the contract, to set her to work instead of abandoning her, was no conversion. *Rand v. Oxford*, 34 Ala. 474.

With regard to the principle already referred to (§ 3 *b*), that misappropriation of part of the property will be a conversion of the whole; it was suggested by *Patteson and Coleridge, Js.*, that, if a bail-ee of wine draws off and converts part of it without the owner's knowledge, and at the end of six years is sued in trover for the whole; he cannot set up his conversion of part as a conversion of the whole, to support a plea of the Statute of Limitations.

Trover does not lie for personal prop-

erty sold illegally, or to one incapable of buying, and actually delivered. *Morris v. Hall*, 41 Ala. 510.

(*a*) So it is held in New York, that where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and mortgages, in consideration of such loan; the assignment is void, and trover may be immediately maintained for them by the mortgagor. *Schroepfel v. Corning*, 2 Seld. 107. See *Smith v. Marvin*, 27 N. Y. 187.

But the declaration must conform to the statute (2 R. S. 852, § 3). 2 Comst. 132.

So where the owner of stock pledges it as collateral security for a usurious loan, it is held that he may, on a demand of the stock and a refusal to return it, recover its value in an action of trover. And this, although the pledgee by the terms of the contract was authorized to hypothecate it, and had hypothecated it before such demand. *Cousland v. Davis*, 4 Bosw. 619. See *Swift v. Wylie*, 5 Rob. 680.

may maintain trover, without proof of demand and refusal, against a vendee of goods, sold by such debtor before he came under the operation of the insolvent laws; if the sale of the goods was fraudulent, if both the vendee and vendor concurred and united in the fraud, and if the vendee converted the goods to his own use. And demand and refusal constitute one mode, but not the only mode, of proving such conversion.¹ (a) So if a man, in insolvent circumstances, sells property, and the vendee disposes of the property by sale or otherwise, after his vendor has made application for the benefit of the insolvent law, or, if prior to such application, while the goods remain in the possession of the original vendor, he makes a second sale of them, and subsequently to the petition the first vendee adopts or sanctions that sale; such conduct will amount to a conversion, without a demand and refusal.² And it seems that any act of a creditor, to whom property has been conveyed in fraud of the provisions of the insolvent law, which amounts to the use or enjoyment of the property in exclusion of the rights of the assignees, is a conversion.³ Though not the mere

¹ *Salisbury v. Gourgas*, 10 Met. 442.

² *Dietus v. Fuss*, 8 Md. 148.

³ *Tapley v. Forbes*, 2 Allen, 20.

(a) A, fraudulently as against the creditors of his firm and co-partner B, had transferred firm notes to C, in payment of a private debt. The defendant, who was the father of B, and who had advanced the capital for his son, threatened suit against C unless he received satisfaction, and thereupon C gave to him an order on C's agent, for two of the notes. Finding, upon receipt of the notes, that they were indorsed by A, the defendant immediately carried them to C, and demanded other notes in lieu thereof, whereupon C gave his own notes for the like amount. Held, not a conversion for which the defendant was responsible to a receiver of the property of the firm. *Gellatly v. Lowery*, 6 Bosw. 118.

If goods be obtained from A by fraud, and pawned to B without notice, and A prosecute the offender to conviction, and get possession of his goods; it is held that B may maintain trover for them. *Parker v. Patrick*, 5 T. R. 175. See *Peer v. Humphrey*, 2 Ad. & Ell. 495.

Where R. asked H. for a loan of \$50, and gave a watch as security, which H. took, and went away, and after about twenty minutes returned, saying that he could not let R. have the money, and that he had not got the watch; and, on being asked by R. for an explanation, he declined to give any: it seems this is not

in itself a tortious conversion. But R. might sell the watch, so as to give the purchaser a right to demand it of H., and, on his refusal to give it up without sufficient excuse, to maintain trover for it. *Hall v. Robinson*, 2 Comst. 293.

Where the defendant had obtained possession of property under a claim of right, by false assertions as to the result of a lawsuit; held a conversion, without proof of demand and refusal. *Bruner v. Dyball*, 42 Ill. 34.

When a vendee obtains goods by fraud, and gives his own negotiable notes for the price, the vendor may maintain trover without a demand, or a previous tender of the notes, if they have not been negotiated, and are produced at the trial ready to be surrendered. *Ryan v. Brant*, 42 Ill. 78.

P., a planter, employed A. to take charge of his wagon and cotton on its way to M., and to deliver the cotton to G., a merchant at M. A. took the cotton to M., and, in fraud of his duty to P., put it into the possession of T., and employed him to sell it on his (A's) account, representing himself as the owner. T., supposing the cotton to be A.'s, sold it, and paid the proceeds to A., who absconded with the money. Held, T. was liable to P. in trover. *Taylor v. Pope*, 5 Cold. 413.

taking of a bill of sale prior to the vendor's petition under the insolvent law, even if fraudulent as to creditors.¹ And the question of conversion may also arise in case of *mistake*. Thus, where goods are delivered by a vendor to a carrier, and the carrier, after notice from the vendor to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.² So goods were shipped at Sunderland, intended to be sent to the plaintiff's agent in London, but by mistake were conveyed to the defendant, who sold part of them, being at that time ignorant of the plaintiff's being interested in them. The plaintiff, however, afterwards informed him that they were his property, and directed him to detain them till further orders. Held, the defendant was liable for the amount of those sold, as well as those which remained in his hands undisposed of.³ So trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only.⁴ But a creditor who receives in pledge from his debtor the goods of another supposing them to belong to the debtor; and afterwards permits the debtor to sell and deliver them, on the promise of the purchaser to pay the creditor the price thereof, towards the discharge of the debt; does not thereby render himself liable to the owner in trover.⁵ So A and B stored wheat with C, and ordered him to forward and sell. By mistake, he mixed the wheat, sold it together, and sent the drafts for the price to B. Held, he was not liable to A as for a conversion.⁶ And if the plaintiff's sheep become mixed with those of the defendant, and the latter after due diligence cannot separate them; he will not be held liable for them without a demand and refusal. So if he did not know that they were so mixed. Otherwise if, after such notice, he makes no proper attempt to separate and return them.⁷ (a)

¹ *Dietus v. Fuss*, 8 Md. 148.

² *Litt v. Cowley*, 7 Taunt. 169; *Bartlett v. Hoyt*, 33 N. H. 151.

³ *Featherstonehaugh v. Johnston*, 2 Moore, 181.

⁴ *Devereux v. Barclay*, 2 B. & Ald. 702.

⁵ *Leonard v. Tidd*, 3 Met. 6.

⁶ *Pierce v. O'Keefe*, 11 Wis. 180.

⁷ *Cutter v. Fanning*, 2 Clarke (Iowa), 580.

(a) O. had a watch which both he and W. and R. claimed. The watch was left by O. with a jeweller to be repaired. When it was sent for, the jeweller by mistake sent another watch to O. W. and R., by possessory warrant against O., got possession of this watch, and, to regain it, O. brought trover against them.

Held, that to maintain his action he must show title, since to allow him to recover on proof of his former possession alone would be but reopening the question of possession which had been adjudicated under the possessory warrant proceeding. *Wallis v. Osteen*, 38 Geo. 250.

A's taking possession of his house, in

§ 7. In addition to the case of *bailment*, already considered, conversion may also consist, generally, in a *breach of trust* in relation to the property by the party in possession of it; whether the suit be brought against him, or one claiming under him. Thus, where a guardian without right sold property of a deceased ward, and the administrator of the deceased brought trover against the vendee, after demand and refusal; it was held, that the demand and refusal were evidence of a conversion from the time the vendee acquired possession.¹ So A delivered a horse to B, agreeing with him, that, if B would do a certain piece of work within a limited time, he should have the horse, but that the horse should remain the property of A until the work should be completed. B abandoned the work without completing it, and sold the horse to C, who, upon A's claiming the horse, said that A must look to B. Held, that A's right was not divested by the delivery of the horse to B, and that there was evidence of a conversion of the horse on the part of C.² And an unauthorized sale of goods by an *agent* is a conversion, which renders him liable in trover, without a demand, and forfeits his right to a previous tender of the storage.³ (a) So where an agent to sell a horse exchanges him for another, it is a conversion, and trover will lie without a demand.⁴ So, where an agent deposited in a bank a box of specie, belonging to his principal, on general deposit, and took a certificate of deposit in his own name, and subject to his own order; it was held, that a

¹ Dealy v. Lance, 2 Speers, 487.

² Houston v. Dyche, 1 Meigs, 76. See Woods v. Burrough, 2 Head, 202.

³ Etter v. Bailey, 8 Barr, 442; Lindley v. Downing, 2 Cart. 418.

⁴ Ainsworth v. Partillo, 13 Ala. 460.

which B has furniture, is not a conversion of the furniture. Poor v. Oakman, 104 Mass. 309.

The defendant received goods from A, and had every reason to suppose A was the owner. B claimed and demanded them. The defendant did not set up any claim to the goods nor dispute B's right, but stated, in substance, his ignorance of B's ownership, that the property was left with him by A, and that he wished the order of his father or B before delivering the property. Held, not a conversion. Carroll v. Mix, 51 Barb. 212.

When a party receives property delivered to him by mistake, his subsequently repairing and claiming a lien upon it is evidence in an action for conversion, in order to show his motive in receiving it. Purves v. Moltz, 5 Rob. 653.

C., by an affidavit of his ownership, induced F. to deliver up to him a mule which each party had had reasonable grounds to believe his own. Held, not an unlawful conversion. Ten days afterwards, F. coming to him requesting a redelivery, they agreed to meet on a certain day and settle the question, before which day, F., without further demand, brought trover. Held, the action would not lie. Finch v. Clarke, Phil. (N. C.) L. 335.

(a) But where the goods are deposited with a person, to be sold at no less than a certain fixed price, and the depositary sells them at less than that sum; the owner of the goods cannot maintain trover against him, but the proper remedy is an action on the case. Sarjeant v. Blunt, 16 Johns. 74.

jury were authorized to infer a conversion.¹ (a) Upon the same principle, when an administrator sells property of his intestate and buys it himself, it is a conversion as to persons having a title to the property.² Or if a factor pledges the goods of his principal for his own debt.³ And where a person who had purchased goods of one who had no right to sell, upon a demand by the owner, said he should not deliver them up at present, having bought them of the vendor, supposing them to be his, and afterwards held the goods for the space of seven days, without offering to return them; held, sufficient evidence of a conversion.⁴

§ 8. But, to maintain trover, the defendant must have *converted the property to his own use*; or have done some other act with a *wrongful intent*, expressed or implied. And, without conversion, neither possession of the property, negligence, nor misfortune will render trover sustainable.⁵ Thus mere delay of delivery by a carrier is not a conversion.⁶ (See § 9.) So where the petition stated a case of trover and conversion, and the proof was, that the goods were lost by the negligence of the defendant, it was held that the plaintiff could not recover without amending his petition.⁷ So it has been held no conversion, where a shipmaster throws goods into the sea, to save the ship from sinking.⁸ Or to do a work of charity, or a kindness to the owner, without any intention of injuring the property, or converting it to the party's own use.⁹ So where property is left in a person's house without his authority, and contrary to the direction of his servant, his removing it is not a conversion.¹⁰ So castrating a scrub male hog, running among one's stock, is not such proof of a change of property, as to be evidence of a conversion or appropriation to the defendant's own use.¹¹ And it has been held, that where a person, lawfully coming into possession of the property of another, has parted with it previous to a demand by the owner; the remedy of the owner against him is not by an action of trover, but by a special action on the case, or in *assumpsit*.¹² (See chap. 18, § 14.) So there is no conversion,

¹ *Ringo v. Field*, 1 Eng. 43.

² *Carraway v. Burbank*, 1 Dev. 306.

³ *Kennedy v. Strong*, 14 Johns. 128.

⁴ *Sargant v. Gile*, 8 N. H. 325.

⁵ *Rogers v. Huie*, 2 Cal. 571. See

Herron v. Hughes, 25 Cal. 561.

⁶ *Briggs v. New York, &c.*, 28 Barb. 515.

⁷ *Duncan v. Fisher*, 18 Mis. 403.

⁸ *Bird v. Astcock*, 2 Bulstr. 280.

⁹ *Drake v. Shorter*, 4 Esp. 165.

¹⁰ *Centhiere v. Ryder*, 1 Edm. 273.

¹¹ *Byrne v. Stout*, 15 Ill. 181.

¹² *Kelsey v. Griswold*, 6 Barb. 436.

(a) If an agent, having authority to take a note payable to his principal, in discharge of a debt, take it payable to himself, the principal may waive the

wrongful act, and claim to have the note delivered to him, and maintain trover for its conversion. *M'Near v. Atwood*, 5 Shep. 434.

without a repudiation of the right of the owner, or the exercise of a dominion inconsistent with that right. Thus H., residing in Paris, despatched seven cases of goods by a railway, via Dunkirk to London, deliverable to N. or order. One of the cases arrived at Dunkirk, damaged. R., the agent of the railway, and of the Dunkirk and London steamboats in connection with it, had the damaged case inspected according to the law of France, and consigned it to the defendant, the broker for the steamboats in London, to hold at the disposal of N., or order. N. accepted a bill of lading for the case. On its arrival at London, no one having claimed the case within the time specified in the bill of lading, the defendant paid the duty on it, and removed it into a warehouse of B., and B. removed it into another of his warehouses, without the defendant's knowledge. There it was burned by an accidental fire. Held, that, whether the defendant was bound to pay, or justified in paying, the duty, or not, there was no conversion by him.¹ So, although every unlawful taking of the chattels of another, with intent to convert them to the use of any other than the owner, and every unlawful taking which destroys or alters the nature of the chattels, is a conversion; the bare removal of the chattels of another, without any intent to deprive him of their possession, and which does not affect their condition, is not a conversion.² And a mere omission of duty is held not to be a conversion. Thus a negro man, employed upon a railroad, asked the agent to let him put A, another negro, in his place, for the day, but the agent, finding that A was a slave, refused. A, however, at the instance of the other negro, got into a car and went seven miles, and assisted some in the work, before he was observed by the agent, who did not force him off then, but let him remain until they went seven miles more to their place of destination. There the agent told the hands in his employ, addressing them by the appellation of "boys," to get down and stop the cars. A got down among them, but, being inexperienced, blundered and fell, and the wheels of the car, passing over him, gave him a wound of which he soon died. In trover against the railroad company, held, the mere omission to force the slave from the cars, when first discovered, was not of itself a conversion, especially as he could be returned in the cars, with more safety and expedition than he could be got home by being sent afoot; and the acts of the agent

¹ *Heald v. Carey*, 9 Eng. L. & Eq. 429; ² *Sparks v. Purdy*, 11 Mis. 219.
11 Com. B. 977.

were not such as to render either him or the company liable for damages.¹

§ 9. And more especially will any slight interference by one person with the property of another not be deemed a conversion, where such interference is connected with the exercise of some right of the former. (a) Thus the plaintiff, a porter on the custom-house quay, put in goods belonging to A, and laid them so that the defendant could not get to his chest without removing them. He did remove them a short distance, and without returning them to their place went away; and the goods were lost. The plaintiff made satisfaction to A for the goods, and brought trover against the defendant. Held, although the plaintiff had sufficient property in the goods to maintain trover, there was no conversion by the defendant.² So, where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering under the writ of possession, turned the servants off the land, and would not let them remain for the purpose of removing the goods; there having been no subsequent demand or refusal, held, the jury might find that there was no conversion.³ So, in trover for timber, the pleas were, not guilty, and a justification, that the defendant was possessed of a close, and was digging a saw-pit therein, and, because the goods were put and placed on the close by the plaintiff, without leave or license, and were so buried therein, that the defendant could not make the saw-pit without a little cutting and destroying the said goods, the defendant did necessarily a little cut and destroy them. Replication, *de injuriâ*. It appeared, that several spars, used for bowsprits, were placed on the defendant's land by the plaintiff; that the plaintiff covered them over with earth, and then directed a pit to be dug, and, in order to dig the pit, the spars were unavoidably cut asunder. The premises being close to the river Thames, some pieces of the spars were accidentally washed away. Held, that there was no conversion of the timber; that it was a misdirection to leave to the jury the intention of the defendant in making the pit; for, if the timber was wrongfully put on his land, the

¹ Railroad Co. v. Kidd, 7 Dana, 245.

² Bushel v. Miller, 1 Strange, 128.

³ Thorogood v. Robinson, 6 Ad. & Ell. N. S. 769.

(a) The plaintiff purchased five negroes of a tenant for life, intending to run them out of the State, and to defeat the interest of those in remainder. To protect their interests, the defendant

seized the negroes. In an action of trover, it was held that such seizure was not a conversion. Sharp v. Nesmith, 6 Rich. 31.

defendant would be justified in cutting it, if he could not make the pit without doing so, whatever his intention might be; but that the plea was bad, for not stating that the timber was buried by the plaintiff.¹ And, upon similar grounds, trover does not lie against a carrier for negligence, as for losing a box; although it lies for an actual wrong, as if he break it to take out goods, or sell it. And refusal to deliver is no evidence of conversion, if the thing has been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, this is good evidence of a conversion.² (a)

§ 10. But, as we have seen (§ 6), the assertion of a claim to personal property, or the wrongful dominion and assumption of property in personal chattels, by one who *threatens* the rightful owner if he attempts to take or remove them; amount in law to a conversion, and are not merely evidence of it. And the party is liable for that which he removed after, as well as before, the institution of the suit.³ (b) Thus where the defendant came into possession of slaves

¹ *Simmons v. Lillystone*, 20 Eng. L. & Eq. 445.

² *Anon.*, 2 Salk. 656.

³ *Hare v. Pearson*, 4 Ired. 76; *Crocket v. Beaty*, 8 Humph. 20.

(a) See chap. 46, § 18. Also § 8. A slave, bequeathed to one for life, and then over, had been carried off, and not heard from for more than seven years before the death of the tenant for life. Held, in an action of trover for the slave, by the ultimate proprietor, after the death of the tenant for life, that a presumption of the slave's death arose, after seven years' absence without being heard from; and that the plaintiff must fail in his action, because there was no proof of property in himself, nor a conversion by the defendant. *Lewis v. Mobley*, 4 Dev. & Batt. 323.

Where the defendant took a cow of A, who was not the owner of the cow, but of this the defendant had no knowledge, to keep through the winter, under a contract that he might buy her in the spring, if A did not pay him for her keeping; held, the defendant could not be regarded as a purchaser of the cow, or as claiming a right to her as owner. *Deering v. Austin*, 34 Vt. 330.

A, the owner of a cow, on the 30th of August, 1859, turned her out and delivered her to the plaintiff as security for a debt. The plaintiff kept her until October 30th, 1859, when A, not having paid the debt, wrongfully took the cow, and contracted with the defendant, who had no knowledge that A was not the rightful owner, to keep the cow for him through

the ensuing winter for eighteen dollars, with a provision, that, if A did not pay it in the spring, the defendant might purchase the cow and pay A twenty dollars for her. On December 3, 1859, the plaintiff sold his interest in the cow to B, who called on the defendant April 12, 1860, notified him of his title, and demanded the cow. The defendant refused to give her up. Held, no evidence of a conversion in this suit, although it might have been in a suit in the name of B. *Ibid.*

(b) A lessor gave the lessee a written permit to move certain buildings on the premises, and erect others, with a stipulation, that, at the expiration of the lease, the lessee might take away or sell upon the premises the new buildings, after the restoration of the old ones to their original position. A new building having been erected, and the position of the old ones altered, the lease was surrendered. The lessee sold the new building, and the plaintiff, his vendee, before the expiration of the time for which the lease was given, and without entering on the premises for the purpose of restoration, demanded the new building of the defendant, the grantee of the original lessor, saying that he was the owner of the building, and was ready to comply with all the conditions of the original permit. The defendant replied, that he should hold by force if any attempt was made to remove the building.

as a loan, and after the death of the lender, and with knowledge of the plaintiff's title, derived by will from the lender, asserted title to the slaves, and declared that he would hold them in spite of them; it was held that this, coupled with user and acts of control, was a conversion.¹ So trover lies, where the owner of the land forbids a purchaser at a sheriff's sale to go upon the land to bring away the goods.² Upon a similar principle, if a party pay money, in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer.³

§ 11. The question of conversion may arise, where goods are seized or detained by *process of law*, or by a legal officer. (*a*) (See chap. 29 *et seq.*) Thus to maintain trover against a sheriff selling under attachment, the owner need not prove a conversion by the sheriff to his own use.⁴ So if an officer attach goods on a writ against a third person, and place them under the care of a keeper, who keeps them under his control, and absolutely refuses to deliver them to the owner upon request, without asking time for consultation with the officer; this is sufficient evidence of a conversion. And this, although the goods were consigned to such third person for sale, in boxes marked with his own name, and were in his store with his own goods, all of which were attached at the same time; if, at the time of making the attachment, the officer was informed that some of the goods in the store did not belong to the defendant in the writ.⁵ So a suit lies against an officer, for the conversion of goods attached by him as the property of one who is alleged to have purchased them of the plaintiffs by means of false representations, without proof that the attaching creditor knew of the fraud. And evidence of the good

¹ Adams v. Mizell, 11 Geo. 106.

² Nichols v. Nenson, 2 Murph. 302.

³ Shipwick v. Blanchard, 6 T. R. 298.

⁴ Nutter v. Ricketts, 6 Clarke (Iowa), 92.

⁵ Bowen v. Sandborn, 1 Allen, 389.

The plaintiff brings an action of tort for the conversion of the building. Held, no demand was necessary on the part of the lessee, but only a fulfilment of the stipulation in the permit, and, if the lessee was on the premises at the proper time, and attempting to perform the conditions, and was refused that privilege, it might be evidence of conversion; but, the lessee having failed to restore the buildings to their original condition, the demand made from a distance was not such evidence. Parker v. Goddard, 39 Me. 144.

(*a*) A creditor's seizing and selling a stock of goods by authority of a mere

salesman in the store is a conversion. Bane v. Detrick, 52 Ill. 19.

See Driscoll v. Place, 44 Vt. 252.

A and B, a peace-officer and a private person, without a warrant, arrested a slave who had committed a misdemeanor in another county, and not in their presence, and, instead of carrying the slave before a magistrate for an examination, forcibly took him from the possession of his owner, and committed him to the county jail, from which he escaped and was thereby lost to his owner. Held, A and B, and C, the jailer, were liable to the owner for his value. Munford v. Taylor, 2 Met. (Ky.) 599.

reputation of the purchaser for honesty and moral worth is inadmissible in defence.¹ So trover lies against an officer, for goods sold on execution, which are by law exempt from such sale.² Or when property has been taken upon execution, issued on a judgment void for want of jurisdiction in the court rendering it. Or against any one receiving the property from the officer.³ (a) So a purchaser of the goods of A at a sale on execution against B acquires no property in them, and, if he takes them, is liable to A in trover.⁴ So attaching creditors are liable, jointly and severally, for a wrongful attachment.⁵

§ 11 a. But trover does not lie merely for a *malicious attachment*.⁶ And an officer may defend against a claim for conversion, under a judgment, though wrongful. Thus, if A recover in replevin a parcel of sheep, and B, as the servant, and by the command of A, take them, with the assistance of the sheriff's officer, and put them into his master's grounds; a refusal by B to redeliver to their true owner on demand is held not a conversion, although the judgment in replevin be wrongly given.⁷ And the general rule

¹ Atwood v. Dearborn, 1 Allen, 483.

² Mandlove v. Burton, 1 Cart. 39.

³ Martin v. England, 5 Yerg. 313.

⁴ Champney v. Smith, 15 Gray, 512; Riley v. Martin, 35 Geo. 136.

⁵ Wehle v. Butler, 12 Abb. Pr. N. S. 139.

⁶ Rogers v. Pitman, 2 Jones, 56.

⁷ Mires v. Solebay, 2 Mod. 242. See Arthur v. Balch, 23 N. H. 157.

(a) If an officer attaching goods, subject to the lien of a common carrier for freight, pay that freight, that he may get the goods into his possession; in respect to the lien, he stands in the place, and has the rights, of such carrier. But if, on a demand of the goods, he makes an unqualified refusal, without any claim of lien, he cannot afterwards set up such lien as a defence to an action of trover for the goods. Thompson v. Rose, 16 Conn. 71.

The owner of a horse mortgaged it and delivered possession to the mortgagee. Afterwards the mortgagor assigned his remaining interest to C., and became the servant of C., and the mortgagee permitted C. to make use of the horse. C. and the mortgagor afterwards delivered the horse to S., to be depastured. Afterwards, on July 10th, the mortgagee conveyed his right to the four plaintiffs, and on the same day C. conveyed his right of redemption to three of them. July 13th, the horse was attached, while in the hands of S., in a suit on a note against C. and the mortgagor, brought in the name of the payee, but by the direction and for the benefit of the indorser, the defendant in the present action, and was

sold on the execution in that suit, and purchased by the present defendant. In a short time after the attachment, S. was notified by a letter from C., that the horse was sold to the plaintiffs, and he was requested to deliver it to them, of which he informed the nominal plaintiff in that suit, but no such delivery was made. Held, the defendant was liable in trover for the horse, and that the original taking by the defendant was tortious, and therefore trover might be sustained against him without any previous demand. Hunt v. Holton, 13 Pick. 216.

And the same question may arise in connection with an *attachment* of property, and not only between the parties to the suit and the officer, but between the latter and his bailee or receiptor. Thus the expression, "we being receiptors," in a written admission of a demand and a refusal to deliver goods, for the recovery of which an action of trover on an officer's receipt for property attached had been brought, was held to be evidence only of the fact that a receipt had been given. And it was also held, that the plaintiff's right to recover must depend upon the tenor of the receipt. Taylor v. Rhodes, 26 Vt. 57.

is held to apply to one claiming under legal process, that a mere temporary intermeddling with property, abandoned by the party upon a claim made by the owner, is not a conversion. Thus, where a levy was made, under an attachment, on property in the hands of a mechanic, but the officer did not take actual possession; and the plaintiff in the attachment, as soon as he was informed that there was a claim to it by a third person, gave notice to such person that he relinquished all right to the property: held, no conversion.¹ (a)

§ 11 b. So trover lies against officers of the revenue, for making a wrongful seizure of goods.² As for seizing and carrying away goods for non-payment of duty, if they are not liable to pay it.³ (b) Or where a toll of corn had been customarily taken, by dipping into the sack so as to bring out a certain quantity, and the collector, the defendant, varied from the proper mode (by sweeping instead of lifting the toll), so as to take more.⁴ So

¹ *Bailey v. Adams*, 14 Wend. 204. See *Barker v. Binninger*, 14 N. Y. 270.

² *Tinkler v. Poole*, 3 Wils. 147.

³ *Chapman v. Lamb*, 2 Strange, 943. *Contra, Etriche v. Officer, &c.*, Bunb. 67.

⁴ *Norman v. Bell*, 2 B. & Ad. 190.

(a) See *Smith v. Van Olinda*, 48 N. Y. 169. An officer is not made liable for the conversion of attached property, by proof that it has been stolen from his possession. *Dorman v. Kane*, 5 Allen, 38.

A cask of gin was attached by the defendant, as an authorized person, upon a writ against the plaintiff, and the suit finally resulted in a nonsuit, whereupon the plaintiff demanded the gin of the defendant, from whose house, however, in his absence, it had been previously taken and sold by another person, who claimed to own it. When sold it contained seven gallons less of liquor than when attached, which had been taken out by some one, or had evaporated or leaked out. Held, no evidence of conversion. *Nutt v. Wheeler*, 30 Vt. 436.

One, who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale in pursuance of a previous arrangement to that effect, is not thereby guilty of a conversion. *Polley v. Lenox, &c.*, 2 Allen, 182.

A person in possession of property in another State, under a sale from an insolvent debtor who has since been put into insolvency in Massachusetts, may maintain an action for conversion against a creditor attaching such property, although the sale was in fraud of creditors, such attaching creditor being a citizen of Mas-

sachusetts. *Pomroy v. Lyman*, 10 Allen, 468.

A trip-hammer and other cumbrous articles of machinery were attached by an officer, in the shop where they were used, and bailed to the defendant, with the understanding that such use should continue. The officer, in the street, and near the shop, demanded the articles of the defendant, who thereupon offered to go at once to the shop and deliver them; but the plaintiff neither went with the defendant nor designated any other place of delivery. Held, the shop was the proper place of delivery, and there was no proof of a conversion. *Durgin v. Gage*, 40 N. H. 302.

An officer, who, under a writ of replevin takes the property described in it, is not liable in trover. *Weinberg v. Conover*, 4 Wis. 803.

When attached property is replevied by a stranger in good faith, without any knowledge or notice of the title of the real owner, and he afterwards holds the property in subordination to the bailment, and does no act inconsistent with his duty as bailee; he is not liable in trover. *Morris v. Hall*, 41 Ala. 510.

(b) In trover, it is held that the defendant cannot justify detaining goods, till custom-house duties paid on them without authority are refunded. But the amount so paid may be deducted in damages. *Stone v. Lingwood*, 1 Strange, 651. But see *Green v. Farmer*, 4 Burr. 2214.

where a public officer received goods, the detention of which was not justified by an act of Parliament, and refused to give them up to the owner without payment of salvage; this was held to be evidence of a conversion.¹ (a) So trover may be maintained against a *postmaster*, in the courts of New York, for improperly detaining a letter or newspaper addressed to the plaintiff, although such detention is under color of the laws of the United States, and the regulations of the post-office department. But the conversion should be clearly proved, the withholding shown to be without color of right, and the plaintiff should establish his own title by unquestionable evidence.² An action for conversion was held to lie, where goods of the plaintiff were seized by authority of a Confederate court, during the war, as the property of alien enemies, were confiscated and ordered to be sold, and purchased and paid for by the defendants.³

§ 12. As has been already stated, an unauthorized, wrongful, fraudulent, or illegal taking or appropriation of property constitutes *actual conversion*, for which an action lies, without previous *demand and refusal*.⁴ Thus, where there is evidence of a conversion by selling the property, proof of a demand and refusal is unnecessary; although in the first instance the property came lawfully to the defendant.⁵ And in trover for property obtained by the defendants by an act of trespass, a demand is not necessary.⁶ So a demand was held unnecessary, where part of a raft of logs, sold by the plaintiff to A and being run to market, came into the boom of the defendant, were then resold by A to the plaintiff and afterwards disposed of by the defendant.⁷ So where the defendant came into possession of goods wrongfully, no tender is necessary of the amount of freight, &c., paid by him, to enable the plaintiff to maintain trover.⁸ So the plaintiff pawned a watch and afterwards gave the defendant the duplicate to get it out of pledge.

¹ Clark v. Chamberlain, 2 Gale, 127.

² Moses v. Walker, 2 Hilt. 536; Paige v. O'Neal, 12 Cal. 483; Teall v. Felton, 3 Barb. 512; 1 Comst. 537; 12 How. (U. S.) 284.

³ Allen v. Bridgers, 52 Barb. 604.

⁴ Carr v. Gale, Daveis, 328; Gentry v. Madden, 3 Pike, 127. See Conner v. Allen,

33 Ala. 515; 57 Penn. 365. See Barry v. Fisher, 8 Abb. Pr. N. S. 369.

⁵ Kyle v. Gray, 11 Ala. 233; Davidson v. Donadi, 2 E. D. Smith, 121.

⁶ Matheny v. Johnson, 9 Mis. 232.

⁷ Couillard v. Johnson, 24 Wis. 533.

⁸ Lempriere v. Pasley, 2 T. R. 485.

(a) But a public officer will not be held guilty of a conversion, unless he has wrongfully asserted a claim or title to the property in question. Thus a surveyor of highways lawfully removed wood which was placed within the limits of the high-

way, and gave notice to the owner where he had put it, and told him he might have it on paying for the removal. Held, no conversion. *Plumer v. Brown*, 8 Met. 578.

The defendant took it out accordingly, on paying the advance and interest. The plaintiff's agent claimed the watch from the defendant, saying, the plaintiff would of course pay what had been advanced to redeem it. The defendant said he had not got the watch, and would not tell who had. Held, evidence of a conversion to sustain a verdict for the plaintiff in trover, and that the plaintiff was not bound to tender the defendant the sum paid on account of the watch, as the defendant did not have it ready to deliver to him in return.¹

§ 12 *a*. But it now remains to be more distinctly explained, that demand and refusal will furnish a ground of action, although the property was at first rightfully acquired.² (*a*) Upon this point it has been sometimes held, that, where there is proof of a positive and unexcused refusal to deliver on demand made, the judge may advise the jury, *as a matter of law*, to find a conversion;³ that such demand and refusal are not merely evidence of conversion, but *per se* constitute such conversion.⁴ It is, however, the prevailing doctrine, that refusal upon demand is not an actual conversion, but evidence of it;⁵ (*b*) which, however, is conclusive,

¹ Jones v. Cliffe, 3 Tyr. 576.

² See Blakely v. Ruddell, 1 Hemp. 18; Whitney v. Slanson, 30 Barb. 276; Folsom v. Manchester, 11 Cush. 834; Dietus v. Fuss, 8 Md. 148; Yeager v. Wallace, 57 Penn. 365.

³ Mitchell v. Williams, 4 Hill, 13.

⁴ Baldwin v. Cole, 6 Mod. 212.

⁵ Munger v. Hess, 28 Barb. 75; Morris v. Pugh, 3 Burr. 1241; Boyle v. Roche, 2 E. D. Smith, 335.

(*a*) Proof of demand and refusal does not preclude other evidence of conversion. Clark v. Hale, 34 Conn. 398.

A demand, or any other effort for recovery of the property, is not, of itself, a waiver of a previous conversion. Cobb v. Wallace, 5 Cold. 539.

It is held that a party cannot avail himself by an instruction of a want of demand, unless expressly set up accompanied by a tender. Raithel v. Dezetter, 43 Mis. 145.

(*b*) Upon this principle, a demand and refusal may be evidence of a *prior* conversion. Thus, where deeds were in the defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term. Wilson v. Girdleston, 5 B. & Ald. 847.

But, in case of wrongful sale, the conversion of property relates to the time of the sale by which the defendant claims it. Head v. Goodwin, 37 Me. 181.

And a plaintiff, who had no title to the

goods at the commencement of the action, cannot maintain trover for their conversion. Clapp v. Glidden, 39 Me. 448.

Conversion so far *consists in*, instead of being merely *proved by*, demand and refusal, that if, in trover, there has been a demand and refusal within six years before the bringing of the suit, and there is no other evidence of conversion; the Statute of Limitations will not bar the action. Collis v. Bowen, 8 Blackf. 262.

Thus an executor left household stuff in the house, by consent of the heir, who used it afterwards. Within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them; whereupon trover was brought, and the Statute of Limitations pleaded. Held, the demand and refusal being within six years, the action was not barred. Montague v. Lord Sandwich, 7 Mod. 99.

If there has been a tortious use or taking, a subsequent demand will not operate as a waiver of the conversion, nor entitle the defendant to prove an offer to return

if not rebutted or explained.¹ A demand and refusal, made when the defendant had power to deliver the goods, is held equivalent to a conversion, unless explained by sufficient evidence.² So a slight agency on the part of the defendant, in resisting the claim of the owner, is sufficient to sustain a recovery.³ And it has been held that a demand by the attorney of the plaintiff, by a letter actually received by the defendant before the action is brought, is a sufficient demand.⁴ So where an owner of materials puts them into the hands of a bailee, to have work done on them, and then returned, and they come to the possession of the defendant, and the bailee, without special authority from the owner, demands them in order to return them to him, and the defendant refuses to deliver them; this is evidence of a conversion.⁵ So in case of sale with the right to return, refusal upon demand will sustain an action for conversion.⁶ So trover lies for money received by the defendant from a third person, and not paid over on request.⁷ So the plaintiff left property, which he had purchased at an execution sale, with the defendant, for the purpose of allowing the judgment debtor to redeem it; but, if he did not choose to do so, the defendant was to deliver the property to the plaintiff when demanded, or account for it. When called upon, the debtor not having redeemed, he refused to do either. Held, that trover would lie.⁸

§ 12 *b*. But the law is sometimes strict as to the precise form of demand. Thus a demand in these words, "I shall have to take them from you, if I cannot get my money any other way," is not sufficient, the original taking having been lawful.⁹ So a demand must apply to the specific property, for the conversion of which the action is afterwards brought. Thus the plaintiff, being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them in the possession of the defendant, who was the owner up to the marking. The plaintiff afterwards applied to the defendant, who still had possession of the

¹ *Magee v. Scott*, 9 Cush. 148.

² *Dietus v. Fuss*, 8 Md. 148.

³ *Farrar v. Chauffetete*, 5 Denio, 527.

⁴ *Potter v. Cromwell*, 40 N. Y. 287.

⁵ *Lovejoy v. Jones*, 10 Fost. 164.

⁶ 3 Fost. 444.

⁶ *Miller v. Grove*, 18 Md. 242.

⁷ *Donohue v. Henry*, 4 E. D. Smith,

162.

⁸ *Boothe v. Estes*, 16 Ark. 104.

⁹ *Monnot v. Ibert*, 33 Barb. 24.

upon such demand. *Manwell v. Briggs*, 17 Vt. 176.

A suit is sometimes considered as in the nature of a demand. But where goods were pawned to secure a debt, it was held,

in an action of trover, that a prior suit, brought for the same goods, was no evidence of conversion. *Prentiss v. Hannay*, 4 Whart. 508.

seven, for the beasts, generally, but the defendant refused to give them up, without qualifying his refusal. Held, no conversion of any of the beasts; the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen.¹

§ 13. Upon the principle that demand and refusal are only *evidence of conversion*, the effect thereof may be repelled, by proof that compliance with the demand was impossible.² As where the property is not in existence.³ And, to maintain trover, the property must be in some way subject to the control of the defendant.⁴ He must have actual or virtual possession; ⁵ which, however, is sometimes presumed, and is a question for the jury; ⁶ an interest in or control over the property; more especially if he refuses on the ground that he is not in possession.⁷ Therefore, where a special verdict stated a demand and a refusal, but did not show that the property was in the possession of the defendants at the time of such refusal, there being also other evidence, tending to show that the property was not then in their possession; held, not sufficient to entitle the plaintiff to a judgment.⁸ So the defendant, the widow and administratrix of an insolvent, being applied to by his assignees for some papers which had been in his possession at the time of his decease, answered that they were in the hands of her attorney. Held, not sufficient evidence of conversion.⁹ So where the defendant never had any possession of, or control over, promissory notes, claimed by the plaintiff, except as the agent of his wife, who was entitled to hold them; held, his refusal to deliver them, on demand, could not constitute, or be evidence of, a conversion. Also, that the omission or neglect of the defendant, to perform a promise made to the plaintiff, to procure promissory notes from those who rightfully held them, and deliver them to the plaintiff, did not constitute a conversion, where the defendant never had the notes in his possession or control, and was unable in his individual capacity to obtain possession and control thereof.¹⁰ So where A mortgages B's personal property to C, and the mortgage is duly recorded, but C has never had possession of such property, or asserted any right or claim to it, or intermeddled or interfered with

¹ Abington v. Lipscomb, 1 Ad. & Ell. N. S. 776.

² 1 Comst. 522; Bowman v. Eaton, 24 Barb. 528; Dietus v. Fuss, 8 Md. 148.

³ Salt v. Wheeler, 48 N. Y. 492.

⁴ Yale v. Saunders, 16 Vt. 243.

⁵ Traylor v. Horrall, 4 Blackf. 317;

Bowman v. Eaton, 24 Barb. 528; Robinson v. Hartridge, 13 Flor. 501.

⁶ Folsom v. Manchester, 11 Cush. 354; Latimer v. Wheeler, 30 Barb. 485.

⁷ Morris v. Thomson, 1 Rich. 65.

⁸ Hill v. Covell, 1 Comst. 522.

⁹ Canot v. Hughes, 2 Bing. N. C. 448.

¹⁰ Hunt v. Kane, 40 Barb. 638.

it in any way, except to take the mortgage; C will not be liable in trover to B.¹ So where a demand of certain articles, though accompanied by an inventory, was made on the defendant at a distance from the articles, and a copy of the inventory promised; but whether it was furnished or not, did not appear: held, not a sufficient demand.² And, under some circumstances, a mere passive neglect or omission to comply with a demand will not constitute a refusal. Thus the plaintiff hired to B a wagon, which B traded away to C, who drove it to the premises of the defendant, and left it there. The plaintiff called on the defendant for the wagon, and the defendant showed it to him, and said that C had left it there, and that by the trade between B and C he thought the plaintiff had lost his title. The plaintiff made an affidavit, stating the facts, and that the wagon was in C's possession, which he read on the defendant's premises and demanded the wagon, to which the defendant replied, "C has no possessions here, these are my possessions." Held, no conversion.³ So the demand may be insufficient, in requiring the defendant to restore the property in a form which has become impossible, although in consequence of the defendant's own act. Thus the bailee of a gun overcharged and burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it; but the bailee refused to do the repair, and did not return it. Held, not evidence of conversion.⁴ And a mere refusal by the defendant to deliver to the plaintiff a chattel of his, which is on the defendant's premises, is not evidence of a conversion; though it is otherwise with a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel.⁵ So where a chattel was sold and a bill of sale given, and the seller agreed to send the chattel to the buyer by boat, and he delivered it at the wharf, but never sent it; whereupon the buyer demanded a delivery, which was refused, but he knew where the article was, and might have taken it: held, no conversion, and that the remedy of the buyer was on the contract.⁶ So a trip-hammer and other cumbrous articles of machinery were attached, in the shop where they were used, and bailed to the defendant, with the understanding that such use should continue. In trover for the property, it

¹ *Burnside v. Twitchell*, 43 N. H. 390.

² *Breese v. Bange*, 2 E. D. Smith, 474. 422.

³ *Ragsdale v. Williams*, 8 Ired. 498.

⁴ *Rushworth v. Taylor*, 3 Ad. & Ell.

N. S. 699; 3 Gale & Dav. 3.

⁵ *Wilde v. Waters*, 32 Eng. L. & Eq.

⁶ *Roll v. Black, Dudley*, 18.

appeared that the officer, in the street and near the shop, demanded the articles of the defendant, who thereupon offered to go at once to the shop and deliver them; but the plaintiff neither went with the defendant nor designated any other place of delivery. Held, the shop was the proper place of delivery, and there was no proof of conversion.¹

§ 13 *a*. So, although one in possession of the property of another must surrender it on the demand of the owner; if he does not know the applicant to be the owner, he has a right to reasonable proof of that fact.² And one who receives goods knowing that they are not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion.³ So a wife applied to the defendant, an attorney, to bring a bill for divorce and alimony against her husband; and brought notes of her husband to him, that he might take a memorandum of the amounts to insert in the bill. He took the memorandum, and returned the notes to the wife, told her to replace them where she found them among her husband's papers, and saw no more of them. Held, no conversion.⁴ On the other hand, even though he received the property from the plaintiff, the defendant may sometimes show in defence the title of a third person. Thus a warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another.⁵ So where a carrier is summoned as garnishee, and remains in possession of the goods, which have been attached as the property of a third person; his refusal to deliver them to the owner will not be a conversion.⁶ And although, in general, in trover, a defendant cannot give in evidence his answer to a demand; yet, where a demand is made by an agent, and the defendant insists upon the production of his authority, and declines a delivery until then, there is no conversion; and his excuse may be given in evidence.⁷ So where goods, the property of the plaintiff, had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without

¹ *Durgin v. Gage*, 40 N. H. 302.

² *Dowd v. Wadsworth*, 2 Dev. 130; *Blankenship v. Berry*, 28 Tex. 448.

³ *Loring v. Mulcahy*, 3 Allen, 575.

⁴ *Jordan v. Greer*, 5 Sneed, 165.

⁵ *Ogle v. Atkinson*, 5 Taunt. 759. See *Hanna v. Flint*, 14 Cal. 73.

⁶ *Stiles v. Davis*, 1 Black, 101. See *Edwards v. White*, 104 Mass. 159.

⁷ *St. John v. O'Connel*, 7 Port. 466.

an order from the company; held, not a conversion.¹ So A, being insolvent, made a voluntary assignment of all his property to B, the plaintiff, for the benefit of his creditors. B brought this action against the defendant's consignees, claiming for advances and commissions, to recover damages for converting to their own use the property of A. Held, that no demand, unless made in B's name and by his authority, and accompanied by notice and evidence of such authority, would enable B to maintain his suit in this form.² So A lent property to B; and, while it was in B's possession, sold it to C. C sold to D. D brought an action against B for unlawful detention of the property from him. Held, that the action could not be maintained, without proof of demand by D, or a person authorized to make demand for him, and notice to B of D's acquisition of title.³ So F., who had hired a ship and its tackle of the plaintiff for three voyages, at the end of the first, apprehending a seizure under the process of an admiralty court, placed the cables and anchors on the defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables. Two days before the sale, the plaintiff demanded of the defendant the anchors and cables on his wharf, which the defendant, holding them from F., refused to give up. Held, that on this demand, previous to the sale, the plaintiff could not sue the defendant for the anchors and cables in trover, although they had not been removed out of the ship.⁴

§ 13 *b*. But, on the other hand, refusal to deliver is a conversion if the alleged reason is insufficient.⁵ And a party cannot discharge himself of his liability for conversion, by assuming a gratuitous and unauthorized liability to a third person. Thus the vendor of tin shipped it on board a vessel bound to Leghorn, by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn. The tin, being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight, or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person. Held, that this

¹ *Alexander v. Southey*, 5 B. & Ald. 247.

² *Griffin v. Alsop*, 4 Cal. 406.

³ *Wilson v. Cook*, 3 E. D. Smith, 252.

⁴ *Ferguson v. Christal*, 5 Bing. 305.

⁵ *Huxley v. Hartzell*, 44 Mis. 370.

was sufficient evidence of a conversion.¹ So in an action for the conversion of cattle, the defendant, after a refusal to deliver, cannot object that the plaintiff had sold a part of them to A.² And a party holding property, and refusing to deliver it on demand made, because he doubts the authority of the person making such demand, must place his refusal distinctly upon that ground; otherwise the refusal affords presumptive evidence of a conversion.³ Thus, where one receives a chattel, under a stipulation in writing that he will return it "whenever called for, in good repair, and free from expense;" he must deliver it on demand, or excuse the non-delivery. If, when demand is made by a third person, in whose hands the writing was placed for that purpose, the bailee does not call on him to produce his authority, but places his refusal upon the ground that the chattel had been removed from his possession by some other person; he cannot object in his defence to an action of trover, that the agent did not show an authority when the chattel was demanded.⁴ So, where the plaintiffs sold goods to A, who paid for them and was to take them away, but, the defendant becoming possessed of the place in which the goods were deposited, the plaintiffs' attorney, accompanied by A, demanded them of the defendant, telling him that they belonged to the plaintiffs, and that they had sold them to A, to which the defendant answered, that he would not deliver them to any person whatsoever; and afterwards the plaintiffs repaid the money to A: held, that this demand and refusal were sufficient evidence of a conversion, without a new demand by the plaintiffs, after they had repaid the money to A.⁵ So the unconditional refusal, of the person in possession of a chattel belonging to another, to deliver it up on demand, although it is at a great distance from the place of demand, is a conversion.⁶ So, although an agent, having received a chattel for his principal, is not bound to deliver it to the true owner, and a refusal would be no evidence of conversion; he must prove his explanation — his mere declaration at the time is insufficient.⁷

§ 13 *c.* But a qualified refusal is not, *per se*, a conversion, but the question should be left to the jury. And a subsequent tender to the attorney of the plaintiffs, before suit brought, is, it seems, a bar to an action.⁸ So if delay is asked for the purpose of obtaining legal

¹ Thompson v. Trail, 6 B. & C. 36.

² Moore v. Aldrich, 25 Tex. (Supp.)

276.

³ Ingalls v. Bulkley, 15 Ill. 224.

⁴ Spence v. Mitchell, 9 Ala. 744; 27 293.

Miss. 362.

⁵ Pattison v. Robinson, 5 M. & S. 105.

⁶ Clark v. Hale, 34 Conn. 398.

⁷ Carey v. Bright, 58 Penn. 70.

⁸ Thomson v. Sixpenny, &c., 5 Bosw.

counsel, a reasonable time will be allowed for this purpose, before conversion. Thus in trover against an executor, it appeared that the watch, which was the subject-matter of the action, had been given by the testatrix to one S. in September, 1837; that S. redelivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff, in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839. Held, sufficient evidence of a conversion within six months before the death.¹ Where the defendants have goods in their hands, with a lien for a general balance, it requires a tender and demand on the part of the plaintiff, as well as a refusal on the part of the defendants, to constitute a conversion. But where the only lien is for freight and expenses, an offer to pay these, and a demand and refusal of the goods, are sufficient.²

§ 13 *d.* The plaintiffs, being the owners of the defendant's promissory note for \$2000, pledged it to a third party, as collateral security for their note for \$1000 discounted by him. At the maturity of the defendant's note for \$2000, the plaintiffs being insolvent, he paid to the holder the amount for which his note was held as collateral security, and received the same, together with the plaintiffs' note for \$1000. Held, in an action of trover for the \$2000 note, the defendant was not entitled to retain it until he was repaid the \$1000 advanced by him; and the measure of damages (the plaintiffs being an insurance company) was what they would have been entitled to recover in an action on the note itself, deducting the amount paid by the defendant.³

§ 13 *e.* In trover against A and B for a lease, a demand having been made upon A, he declined to give up the lease until certain rent due to B was paid; but he added, that it was more B's business than his own, and, as he was not in, he (A) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff, receiving neither lease nor letter, issued his writ on the following morning. Held, an absolute refusal, notwithstanding the defendants had at the time (though it was not mentioned) a lien upon the lease, for a small sum due to them for business done by them as attorneys for the plaintiff.⁴

§ 14. The conversion of goods, consisting in refusal to deliver

¹ *Richmond v. Nicholson*, 8 Scott, 134.

² *Wagenblast v. M'Kean*, 2 Grant, 393.

³ *Craig v. McHenry*, 35 Penn. 120.

⁴ *Weeks v. Goode*, 6 C. B. N. S. 367.

them upon demand, may be denied or justified upon the ground of *legal authority*. Thus the seizure of goods fraudulently purchased, on regular process in favor of a creditor of the vendee, is not a tortious act, and a demand by the vendor, accompanied by a statement of his title, is necessary to sustain trover against the officer. But if, upon such demand, there is an unqualified refusal by the officer to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it; the jury may presume a waiver of any information on that subject.¹ So proof of an attachment of goods upon a writ against one in possession of them, without title, will sustain an action for conversion against the officer.² So an attachment of mortgaged property, followed by a refusal to give it up, on demand, and exhibition of the mortgage and mortgage debt, is competent and sufficient evidence of conversion, whether at the time of the demand the property be actually in the possession of the officer or not.³ So trover lies for a horse, seized under pretence of necessity for the public service, and withheld after demand, made subsequent to the termination of such exigence.⁴

§ 14 *a*. But demand and refusal are not conclusive proof of a conversion, when goods are attached in the hands of the defendant.⁵ So in trover for a chaise, it appeared that a third person had hired it from the plaintiff, and afterwards left it for sale at the defendant's repository for carriages in London. While there, it was attached by process out of a city court against a third party; after which, the plaintiff demanded it from the defendant, who refused to deliver it, on the ground, that, under the circumstances, he should be liable for its value if he gave it up. Held, there was no evidence of a conversion, the chaise being at the time of demand in the custody of the law.⁶

§ 14 *b*. And there are other cases, in which a refusal to deliver property on demand may be justified, upon the ground of legal authority. Thus A sued B in trespass for taking a filly. B justified, that the filly belonged to the plaintiff, and was taken by the plaintiff's command. Verdict for A, with damages, subject to an award by the defendant, one of the jurors, to whom the filly was delivered, with the consent of A and the plaintiff, in order that the defendant might determine in a given

¹ Thompson v. Rowe, 16 Conn. 71.

² Marble v. Keyes, 9 Gray, 219.

³ Ferguson v. Clifford, 37 N. H. 86.

⁴ Fryer v. M'Rae, 8 Port. 187.

⁵ Garvin v. Luttrell, 10 Humph. 16.

⁶ Verral v. Robinson, 5 Tyr. 1069; 1 Gale, 244. See Rogers v. Weir, 34 N. Y. 463.

time, whether the filly was marked with a certain scar; in case the scar should appear, the verdict for A to stand. The defendant, by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, the plaintiff, without authority from B, demanded the filly of A, who refused to deliver it; and a month afterwards the plaintiff sued the defendant in trover for the filly. Held, that this detention of the filly by the defendant did not amount to a conversion.¹ So a vessel and her cargo were seized and libelled by a collector for breach of the revenue laws. Upon petition, a *remittitur* was granted by the Secretary of the Treasury, and an order for the restoration of the property issued from the district court. But the Secretary, upon further consideration, being satisfied that the claimant was not entitled to relief, wrote to the district attorney to return the certificate of *remittitur*, that it might be revoked; of which orders the collector was notified, and for which cause, upon demand by the deputy marshal, under the order for restoration, the collector refused to deliver the property. Afterwards the *remittitur* was revoked, and the owner obtained possession of the property, under an order of the court, by giving a bond therefor, and brought trover against the collector. Held, the property in the hands of the collector was in the custody of the law, and his refusal to deliver it was not a conversion; and that the plaintiff, having admitted, by his petition to the court, and by the giving of the bond, that it was so in the custody of the law, was estopped from charging the collector as a wrong-doer. Also, that, if a portion of the property were abstracted, the plaintiff could not maintain trover against the collector therefor; and it seems, that his remedy should be sought in the court which ordered the restoration.²

§ 15. *Conversion*, as has been already explained, is an injury particularly confined to personal property.³ But the question has sometimes occurred, whether movable articles *connected with the realty* can be sued for in *trover*.⁴ (See chap. 17.) Upon this point it is held, that the *cutting of timber*, without carrying it away, is a conversion;⁵ and that trover is the proper remedy against a trespasser for cutting timber as soon as the timber is cut.⁶ (a)

¹ *Guntton v. Nurse*, 2 Brod. & Bing. 447.

² *Barnes v. Taylor*, 29 Me. 514.

³ *Woodruff v. Adams*, 37 Conn. 233.

⁴ See *Whidden v. Seelye*, 40 Me. 247.

⁵ *Sanderson v. Haverstick*, 8 Barr. 294.

⁶ *Sampson v. Hammond*, 4 Cal. 184.

(a) Turpentine run into boxes (cut into the trees) is personal property, and one who is possessed of the land, though he has no title to it, is the true owner of turpentine so produced by his labor and cultivation, and can maintain trover for

So where wood has been converted, and made into coal, by the defendant, the owner may maintain trover for the coal.¹ So trover may be maintained by the owner of land, for the recovery of crops raised thereon, without license or authority.² So trover lies for cutting and carrying away corn standing and growing.³ Or for a building, standing, as personal property, upon another's land, which he refuses to deliver.⁴ (a) Or against the *bonâ fide* purchaser of loads of earth taken from the plaintiff's land;⁵ or for sand, gravel, and ore.⁶

¹ Riddle v. Driver, 12 Ala. 590.

² Simpkins v. Rogers, 15 Ill. 397.

³ Nelson v. Burt, 15 Mass. 204.

⁴ Pullen v. Bell, 40 Me. 314; Dame v. Dame, 38 N. H. 429.

⁵ Riley v. Boston, &c., 11 Cush. 11.

⁶ Northam v. Bowden, 32 Eng. L. & Eq. 559.

taking it. Branch v. Morrison, 5 Jones, 16.

Certain lands, together with the woods, &c., were conveyed under a marriage settlement to the plaintiffs, their heirs and assigns, during the life of A, in trust, to pay the rents and profits as she should appoint during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as she should appoint, and for want of appointment, to the use of the children equally, &c., and the heirs of their bodies, with cross-remainders; and, in default of such issue, to the use of the right heirs of A forever. Held, that the plaintiffs could not maintain trover against the defendant, a stranger, for certain trees, which had been cut down by order of the husband of A, and carried away by the defendant. Blaker v. Ancombe, 1 New Rep. 25.

It is held that the purchaser of land on an execution, after receiving the sheriff's deed, may bring trover for the timber which had been cut by the defendant, while he remained in possession after the sale. Rich v. Baker, 3 Denio, 79. See Thomas v. Crofut, 14 N. Y. 474.

It has been seen (chap. 17) that similar questions may arise in relation to *fixtures*. Trover will not lie against the owner of real estate in possession, for fixtures annexed to the freehold. Overton v. Williston, 31 Penn. 155.

In a late case, a ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane being fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench fixed to the wall. Held, in the absence of any thing to show that they were put up for purposes of

ornament or trade, trover would not lie for them. Wilde v. Waters, 16 Com. B. 637.

The principle, that an owner can follow his property so long as he can establish its identity, does not protect him, where its nature has been changed by being annexed to the freehold, and becoming part of the realty. Jackson v. Walton, 2 Wms. 43.

Where A gives a license to B to get timber on his land, to be hauled to a certain place and there inspected, but not removed till paid for; trover lies against one who removes and appropriates, against A's will, timber thus deposited. Creach v. McRae, 5 Jones, 122.

In trover for wood, the plaintiff may dispute the title of those, under whom the defendant claims the land from which the wood was cut. Parks v. Loomis, 6 Gray, 467.

(a) In a late case it is held that trover will not lie for a fixture. Prescott v. Wells, 3 Nev. 82.

A building on wooden blocks and without underpinning is personal property, and the refusal of the owner of the land to give up possession of it is a conversion. Hinckley v. Baxter, 13 Allen, 139.

The plaintiff erected buildings upon a farm which he had contracted to purchase. After he had occupied it thirteen years, A, the owner, sold and conveyed to the defendant, verbally agreeing, as was alleged, that the buildings were personal property. The defendant sold and conveyed the farm to B. Held, though such agreement were made, the buildings passed to the defendant as part of the farm, and trover could not be maintained for them. Fenlason v. Rackliff, 50 Me. 362.

§ 15 *a.* *Land-scrip* is treated in law as a chattel, and, unlike an ordinary title-deed, has a market value; a bailor thereof is not required to pursue it in the hands of a third person, or to institute suit to establish his right to it or a portion of it, as against its present holder; but may treat the bailee's refusal to redeliver it as a conversion, and sue for its value.¹

§ 15 *b.* The action for conversion is sometimes brought for money.

§ 15 *c.* Where, on a contract for the conveyance of land by warranty-deed, A tendered the money to B for the purpose of procuring the deed, and B received the money, at the same time handing to A a quitclaim deed without a stamp, and with no name inserted as grantee, and A demanded back the money, which B refused, and A then went away; held, A might maintain trover for the money.²

§ 15 *d.* In ejectment for specific performance, F. recovered a verdict, and paid into court in gold \$1908, the purchase-money of the land, to be taken by A., the defendant, when he filed a deed. The prothonotary received the money, and deposited it with bankers of credit to his own private credit. At that time gold was not at a premium. A. filed his deed after the passage of the legal-tender act, and the prothonotary tendered the money in court in legal-tenders, which were refused, and trover was brought for the gold. Held, A. could not recover.³

§ 15 *e.* An action for conversion lies against one who receives bank-notes from an agent of the plaintiff, with notice, unless they have been mixed with other money.⁴

§ 16. Another questionable subject of the injury of conversion consists of *choses in action*. (See vol. i. p. 49.) In general, it is held that no person can maintain trover for a chose in action, but the legal owner.⁵

§ 17. Trover lies for a *bond*, (*a*) and for *letters-patent*.⁶ In refer-

¹ Nelson v. King, 25 Tex. 655.

² Hinckley v. Lewis, 45 Ill. 327. See

2 Sneed, 650.

³ Aurentz v. Porter, 56 Penn. 115.

⁴ Grand v. Edwards, 56 Barb. 408.

⁵ Webster v. Heylman, 11 Mis. 428.

⁶ Pickering v. Appleby, 1 Com. 355.

(*a*) A town voted to raise a military bounty. Before the vote, but after the call for the meeting, M. enlisted as a substitute for C., and was credited to the quota of the town. The town delivered bonds for M.'s bounty to C., and subsequently paid them, but M. had never agreed or expected that C. should take

the bounty. Held, M.'s assignee, for value, of the bounty could maintain an action against C. for conversion of the bonds; and that C. could not set up, in such action, that no legal obligation was imposed on the town to pay any bounty. Carver v. Creque, 46 Barb. 507.

ence to *judgments*, it is held that trover cannot be maintained for a judgment, nor a note, which is the subject of a judgment.¹ And, though judgments rendered by justices are not records, they are muniments of the rights of both parties, by judicial determination. And the party, in whose favor such judgment is rendered, cannot maintain trover for it.² But the rule, that trover will not lie for a record, applies to the record, strictly so called, which is made and preserved by public authority, and not to such papers as have relation to the record, but are not parcel of it. Therefore a judgment-creditor may sustain trover for a writ of execution, which he has sued out upon his judgment, although the execution may have expired previously to the commencement of the action; since its absence from the office whence it issued might embarrass the plaintiff in procuring a fresh execution upon the judgment, and might even create a presumption that the judgment had been satisfied.³ So a debtor, who has made copies of his creditor's account against him, may, if the creditor obtain possession of such copies, and refuse to redeliver them to the debtor, sustain trover therefor against the creditor.⁴ And a refusal to redeliver to the owner a written account, which he has presented for payment, is held a conversion; even though nothing was due. And the measure of damages is the apparent amount due.⁵ (a)

§ 18. In reference to notes and other negotiable securities, trover will lie for a promissory note in the hands of a third person.⁶ So it is held that trover may be maintained for a note which has been paid, and left by mistake or otherwise in the hands of the holder, or disposed of by him, unless the fact of payment is denied by the holder.⁷ And where the defendant had left the note with an

¹ *Platt v. Potts*, 11 Ired. 266. But see *Hudspeth v. Wilson*, 2 Dev. 372.

² *Cobb v. Cornegay*, 6 Ired. 358.

³ *Keeler v. Fassett*, 21 Vt. 539.

⁴ *Fullam v. Cummings*, 16 Vt. 697.

⁵ *O'Donoghue v. Corby*, 32 Mis. 394.

⁶ *Todd v. Crookshanks*, 3 Johns. 432. See *Brown v. Dunham*, 11 Gray, 42; *Stone v. Clough*, 41 N. H. 290.

⁷ *Pierce v. Gilson*, 9 Vt. 216. Contra, *Todd v. Crookshanks*, 3 Johns. 432.

(a) See *Symonds v. Atkinson*, 37 Eng. L. & Eq. 585; *Perley v. Dole*, 40 Me. 139. Under some circumstances, although an action may be maintained for conversion of a *chose in action*, only nominal damages will be recovered. Thus A effected an insurance on the life of B, and, after an act of bankruptcy, assigned the policy to the defendant, who was aware of A's circumstances at the time. On the death of B, it was discovered that his life was not insurable. On a memorial presented by A to the company, they ordered

half the sum, for which B's life was insured, to be paid as a gratuity, which the defendant received, and the policy was then cancelled, and remained in the hands of their officer. In an action of trover, brought by the assignee of A against the defendant, to recover the value of the policy; held, that he was only entitled to the parchment on which the policy was written, and not to the sum paid by the company to the defendant, as it was a mere gratuitous and voluntary payment. *Wills v. Wells*, 2 Moore, 247.

attorney, a demand of an order on the attorney for the note, and the refusal of the defendant to give such order, contrary to his duty, is sufficient evidence of a conversion.¹ (a) So where a written agreement, dated 2d September, 1808, between A and B, stated, that A thereby delivered to B a certain promissory note of C, for two hundred bushels of wheat, valued at \$200, payable in February, 1811, and engaged, in case the wheat did not sell for \$200, to make up the deficiency; and B thereby gave to A the power of redeeming the note, by paying \$186 with 3½ per cent interest, any time within six months of the time the note was payable: it was held, that the note was deposited as a pledge, and not as a mortgage, and that a tender by A of the \$200, on or before the day the note fell due, was sufficient to entitle him to a return of the note; and on such tender, and a refusal by B, A might maintain trover for the note.² So trover lies by the maker of a note for a fraudulent use of it.³ So the collection of a note, by a person not entitled to it, is evidence of a conversion.⁴ More especially, if a person purchases a note with knowledge of the claim of another to the note, and collects it, he is guilty of a wrongful conversion.⁵ (b) And in such case trover lies against the promisor to whom the note has been given up. Thus the holder of a note, being about to leave his home, left the note in the care of his son, whom, with notice to the maker, he directed not to receive payment in his absence. But, the promisor coming, and insisting upon paying the sum due, the son received it, and delivered him the note, which was not then payable. Held, the owner might maintain trover for the note against the promisor.⁶ So the surrender of a note owned by A and B to the maker by A, without B's consent, is a conversion.⁷ So bills, indorsed to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover.⁸ So trover lies

¹ Bissel v. Drake, 19 Johns. 66.

² McLean v. Walker, 10 Johns. 471.

³ Decker v. Mathews, 2 Kern. 313.

⁴ Donnell v. Thompson, 13 Ala. 440.

⁵ Allison v. King, 25 Iowa, 56.

⁶ Kingman v. Pierce, 17 Mass. 247.

⁷ Winner v. Penniman, 35 Md. 163.

⁸ Truettel v. Barandon, 1 Moo. 543.

(a) But where A, the indorser of a dishonored bill, having paid the amount to B, the holder, demanded the bill from B, who referred him to his (B's) attorney; and, A refusing to go to the attorney, B said, "Then call on Saturday, and in the mean time I will get it for you;" and A called on Saturday, but did not obtain the bill: held no evidence of a conversion. Towne

v. Lewis, 7 Com. B. 608. See Pillott v. Wilkin, 3 H. & C. 345.

(b) If a person wrongfully converts a note belonging to another and collects it, the release of the maker of the note by the owner will not discharge the person converting the note. Allison v. King, 25 Iowa, 56.

for notes, deposited as security for the extinguishment of certain mortgages, upon land formerly belonging to the plaintiff, conveyed by him to A, and by A to the defendant; such mortgages having been virtually extinguished.¹ So A executed two notes, secured by mortgage, to B and C, who transferred the notes and delivered the mortgage to the defendant. The defendant sold and transferred the notes to the plaintiff, and agreed to procure the mortgage, which was then in the hands of D, but subject to the defendant's order, and deliver it to the plaintiff. Upon his refusal to deliver it, held, the plaintiff might maintain trover, and that the defendant could not set up the defence that the notes were not purchased, but paid, and that he should cancel, but not assign, the mortgage.² So if the owner of a note delivers it to brokers for discount, and they, for the same purpose, to a bank, which receives it with an agreement to remit the proceeds to the brokers, but obtains the discount for its own benefit, and keeps the money after a demand for the note by the owner; this is a conversion.³

§ 18 *a*. But trover has been held not to lie for the conversion of a promissory note, after it has been paid or legally discharged in any manner. Though it is otherwise, if the note has not been paid or legally discharged, although the word "paid" has been written across the face of it by mistake, or by one without authority.⁴ And a *bonâ fide* holder of a negotiable note, as security for money lent, is not liable in trover to the real owner of the note until such owner pays or offers to pay him the sum for which he holds the note as security.⁵ Nor will trover lie for a note payable to the plaintiff, which has been delivered to A to collect, and to apply the amount received thereon to the payment of a note which he held against the plaintiff.⁶ Nor for the accidental destruction or loss of a bill by the drawee.⁷ And, upon the general subject of the conversion of negotiable securities it is said, in a late case, the rules and principles of law, applicable to the conversion of a chattel, are not always applicable to the conversion of a negotiable instrument, held by a person who is a party to it, and apparently its holder. Hence if the drawer of a bill, who is also in possession of it as the agent of, and in trust for, the legal holder, but authorized by him to receive the proceeds in a certain way, transfers it

¹ Robbins v. Packard, 31 Vt. 570.

² Gleason v. Owen, 35 Vt. 590.

³ Neale v. Weare Bank, 3 Allen, 202.

⁴ Lowremore v. Berry, 19 Ala. 130.

See Osby v. Conant, 5 Lans. 310.

⁵ Benior v. Paquin, 40 Vt. 199.

⁶ Canfield v. Monger, 12 Johns. 346.

⁷ Salt v. Wheeler, 48 N. Y. 492.

to a third party, who makes an advance of money upon it, and receives the bill in ignorance of the true state of the case, and believing it to be the property of the transferrer; the receipt of the proceeds by the transferee (even in a manner not authorized by the legal holder), as it would not have been an act of conversion by the transferrer, will not be a conversion by the transferee, though followed by the appropriation and retention of the proceeds in discharge of his advance to the transferrer; at all events, if the bill has been given up, on its satisfaction, to the acceptors, and no demand of it has been made until afterwards upon the transferee. But, it seems, a demand and refusal of it, while in the hands of the transferee, would have been evidence of a conversion by him; and in that case he would have been liable to the legal holder.¹ So an action for the conversion of a draft on C, purchased of B, to be sent to A, cannot be maintained, where there is no proof that it was not sent, or that A did not receive the money on it; and that the indorsement of A's name is not in his handwriting, is no proof that he did not receive the money.² So where bills were delivered by a trader, in contemplation of bankruptcy, to the defendant, a creditor, with a view of giving him the preference, and paid to him after the bankruptcy: held, in trover by the assignees, the receipt of the money was not a conversion; and therefore it was necessary for them to prove a demand and refusal, before the bills became due.³ And damages cannot be given in trover for the detention of papers not shown to possess a pecuniary value.⁴ (a)

§ 19. With regard to the *parties* in an action of trover, it is held that trover lies against *an infant* when the goods converted came to his possession by a prior illegal contract.⁵ (See chap. 43, § 14.)

¹ Symonds v. Atkinson, 37 Eng. L. & Eq. 585.

² Boyle v. Roche, 2 E. D. Smith, 335.

³ Jones v. Fort, 9 B. & C. 764.

⁴ Donohue v. Henry, 4 E. D. Smith, 162.

⁵ Lewis v. Littlefield, 3 Shep. 233.

(a) In reference to the measure and amount of damages for conversion of a *chose in action*; see Evans v. Kymer, 1 B. & Ad. 528; New Orleans, &c. v. De Lizardi, 2 La. Ann. 281; Seals v. Cummings, 8 Humph. 442; Menkens v. Menkens, 23 Mis. 252; Mercer v. Jones, 3 Camp. 477; Ingalls v. Lord, 1 Cow. 240; Alsager v. Close, 10 M. & W. 576; Delegal v. Naylor, 7 Bing. 460; Mathew v. Sherwell, 2 Taunt. 439; Parry v. Frame, 2 B. & P. 451; Clowes v. Hawley, 12 Johns. 484; Towle v. Lovet, 6 Mas. 394; Loosemore v. Radford, 9 M. & W. 657; Sewall v. Lancaster, &c., 17

S. & R. 285; Romig v. Romig, 2 Rawle, 241; Kohne v. Ins. Co., &c., 1 Wash. C. C. 158; Cutter v. Fanning, 2 Clarke (Iowa), 580; Ewing v. Blount, 20 Ala. 594; Williams v. Crum, 27 Ala. 468; Jenkins v. McConico, 26 Ib. 213; Wilson v. Conine, 2 Johns. 280.

As to trover for *slaves*; see Collier v. Lyons, 18 Geo. 648; Johnson v. Arabia, 24 Mis. 86; Bell v. Cummings, 3 Sneed, 275; Cheek v. Wheatley, 3 Sneed, 484; Sadler v. Sadler, 16 Ark. 628; Jones v. Allen, 1 Head, 626.

So, on the other hand, an infant, who makes a sale of personal property without fraud, may rescind the sale. But he must restore the property, or the consideration received, before he can maintain his action for the property sold. And if, before a rescission, the purchaser makes a *bonâ fide* sale of the property, trover will not lie against him.¹

§ 20. It is held that the assignee of personal property cannot maintain trover in his own name, where the conversion took place before the assignment.² But the purchaser of property, tortiously in the hands of a third person, may after demand maintain trover therefor.³ It is said, although a mere right of action for a tort is not assignable, yet, after the conversion of a chattel, the owner may sell the chattel itself, so as to give the purchaser a right to reclaim it from the wrong-doer, or maintain trover for it, after demand made in his own behalf.⁴ Thus where A turned cattle into the woods, and B, thinking one of them to be his, took possession of it, after which A, ignorant of B's possession, sold it to C, who was also ignorant of it; held, C might sue B in his own name.⁵ So where the defendant, in the absence of the plaintiff, but at the proper day, set apart property in satisfaction of a contract, of which the plaintiff was the legal assignee and known to be so by the defendant, and there was a subsequent conversion of the property, on the same day, by the defendant; held, the plaintiff had sufficient property and possession to maintain trover.⁶ So one in possession of, and claiming title to, property, which belonged to an insolvent before his insolvency, may maintain an action for conversion against a party who attaches it as such debtor's, and others who take the property under such attachment.⁷ So an assignee of a demand originating in favor of his grantor, for the conversion of logs obtained by a trespass upon the land granted to the assignee, may maintain trover in his own name.⁸

§ 21. A receiver of an insolvent corporation, who is empowered by law to sue for and recover "all the estate, debts, and things in action, belonging to the corporation," may maintain trover for the conversion of the personal property of the corporation before he was appointed receiver.⁹ So trover can be maintained, by an

¹ Carr v. Clough, 6 Fost. 280.

² Overton v. Williston, 31 Penn. 155; Hicks v. Cleveland, 39 Barb. 573.

³ Cartland v. Morrison, 32 Me. 190; M'Ginn v. Warden, 3 E. D. Smith, 355. See O'Keefe v. Kellogg, 15 Ill. 347.

⁴ Hall v. Robinson, 2 Comst. 293. See Gardner v. Adams, 12 Wend. 297.

⁵ Morgan v. Bradley, 3 Hawks, 559.

⁶ Seward v. Heflin, 20 Vt. 144.

⁷ Hubbard v. Lyman, 8 Allen, 520.

⁸ Final v. Backus, 18 Mich. 218.

⁹ Gillett v. Fairchild, 4 Denio, 80.

assignee, for the property of an insolvent debtor, which he refuses to deliver.¹ So trover can be maintained by an administrator, in all cases where the intestate would have had a right of action.² And trover will lie against an administrator personally for a conversion by him, though the property came to him with the estate of his intestate.³

§ 21 *a*. A person is guilty of a conversion, who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be owner, and is ignorant of his principal's want of title.⁴

§ 21 *b*. Military possession was taken by the government of the United States of the stables of A, and, by authority and direction of an officer in charge, B was sent to take possession of the horses of A and bring them away. B accordingly took the horses of A and also some belonging to C. The horses of C were inspected by government and passed over to its service. In trover brought by C against A, held, if the horses of C were passed to the government in the name of and as the horses of A, and he was credited with them with his knowledge and consent, C was entitled to recover.⁵

§ 21 *c*. One tenant in common may maintain an action for conversion against another.⁶ But one joint tenant cannot maintain such action against another, for acts done to save the property from loss or depreciation.⁷

§ 21 *d*. The action for conversion lies, where A has possession of the plaintiff's property, and, as the defendant has reason to believe, without title, and the defendant advises or aids in a sale by A.⁸

§ 21 *e*. Where a lessee, under a decree of court, had liberty to remove erections made by him in a reasonable time after dissolution of an injunction granted therein, although the lease had expired between the granting and dissolution of the injunction, and pending the injunction suit the landlord conveyed, to a *bonâ fide* purchaser without notice, the land, "with the rights, immunities, privileges, and appurtenances thereto belonging;" held, by the sale of the erections, the landlord was guilty of conversion, and

¹ McLeish v. Tylee, 4 Strobb. 287.

² Smith v. Grove, 12 Mis. 51.

³ Burton v. Miller, 1 Harr. 7. But see

Stott v. Alexander, 2 Sneed, 650.

⁴ Kimball v. Billings, 55 Me. 147.

⁵ Thomas v. Sternheimer, 29 Md. 268.

⁶ Delaney v. Root, 99 Mass. 546. See

chap. 33, § 2.

⁷ Kilgore v. Wood, 56 Me. 150.

⁸ Moore v. Eldred, 42 Vt. 13.

the deed was evidence to show such conversion, and was sufficient for that purpose.¹

§ 21 *f.* A person who has from the owner of a horse a paper, intended as a mortgage, but which by a clerical error is defective, and also a verbal license to take the horse under the supposed mortgage, is not answerable in tort for taking him from a person who has no title except under another claiming to be the owner.²

§ 21 *g.* A mortgagor, allowed to retain possession, may maintain trover against a mere trespasser for converting the property, and the latter cannot defend on the ground of a paramount title in the mortgagee.³

§ 21 *h.* A mortgagee, who assigns his title and records the assignment, after the property has been attached in an action against the mortgagor, cannot maintain an action against the officer for an unlawful conversion.⁴

§ 21 *i.* A pledgor may sue for refusal to deliver after payment of the debt, and a promise to redeliver.⁵ A pledgor can maintain trover (or case) against his pledgee who sells pledged stock at private sale.⁶ So where A deposited with B a dock-warrant for brandies, as security for a loan, and agreed that B might sell if the loan was not repaid January 29; and on the 28th B sold the brandy, and on the 29th handed over the warrant to the vendees, who on the 30th took actual possession: held, a conversion of the brandies by B.⁷

§ 22. In reference to *the declaration* for a conversion of property; trover *pro diversis aliis bonis* has been held good.⁸ Or for *plate*, generally. Or two hundred and sixty pieces of silver.⁹ Or "pieces of ends of boards."¹⁰ Or *de decem ponderibus*, Anglicè "weights."¹¹ Or twenty ounces of cloves and mace, though not shown how much of each, or that they were mixed.¹² Or a piece of tepee, without saying how many yards it contained.¹³ So trover for "old iron," without saying what quantity, is good after verdict.¹⁴ So trover for "ten pair of curtains and valons" is, after verdict,

¹ *Bircher v. Parker*, 43 Mo. 443.

² *Sherman v. Matthews*, 15 Gray, 508.

³ *Parkhurst v. Jacobs*, 17 Mich. 302.

⁴ *Horne v. Briggs*, 98 Mass. 510.

⁵ *Roberts v. Bredell*, 11 Am. Law Reg. 262.

⁶ *Baltimore v. Dalrymple*, 25 Md. 269.

⁷ *Johnson v. Cumming*, 15 C. B. N. S. 330.

⁸ *Procter v. Burdet*, 3 Mod. 69.

⁹ *Campbell v. St. John*, 1 Salk. 219.

¹⁰ *Knight v. Barker*, 11 Mod. 66.

¹¹ *Hook v. Galloway*, 12 Ib. 8.

¹² *Hartford v. Jones*, 2 Salk. 654.

¹³ *Radley v. Rudge*, 2 Str. 734; acc. *Bottomley v. Harrison*, Ib. 809; *Haslegrave v. Thompson*, Ib. 810; *White v. Graham*, Ib. 827.

¹⁴ *Talbott v. Spear*, Willes, 70.

sufficiently certain.¹ Or "ricks of hay."² And a state of demand in an action styled trespass, charging "that the defendant took in his possession certain goods and chattels the property of the plaintiff, that he refused and still refuses to deliver them to the plaintiff though requested, and has converted them to his own use;" sets out a case of trover.³ But where personal property, the subject of an action of trover, is described as "certain goods, to wit, a lot of goods in a store of A;" the description is held not sufficiently certain.⁴ And where an action of trover was brought for a slave called John, and there was proof of the conversion of a slave, but no proof that his name was John, it was held that the plaintiff could not recover.⁵ (a)

§ 23. In trover for promissory notes, the plaintiff need not state the dates or times of payment, he being presumed not to have them in his possession.⁶ But where a second count in trover for notes described them as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the promissory notes in the first count mentioned;" it was held bad on special demurrer.⁷ So where the note was described in the declaration to be for one hundred and eighty dollars, and the note proved to be in possession of the defendant was for three hundred dollars, the variance was held fatal; although the declaration alleged that the note in question was to pay to the plaintiff or his order a certain sum of money, to wit, one hundred and eighty dollars.⁸ But if the plaintiff cannot state the precise amount of the note, he may state that it was of great value, to wit, of the value of a certain sum.⁹ (b)

§ 24. In reference to the pleadings subsequent to the declaration, all matters in defence may be given in evidence under the general issue of not guilty, except a release and the Statute of Limitations. Thus the justification of an officer selling property under

¹ Taylor v. Wells, 1 Mod. 46.

² Wood v. Davies, Ib. 290.

³ Glenn v. Garrison, 2 Harr. 1.

⁴ Edgerly v. Emerson, 3 Fost. 555.

⁵ Ward v. Smith, 8 Ired. 296.

⁶ The Receivers v. Neilson, 3 Green, 337.

⁷ Ibid.

⁸ Bissel v. Drake, 19 Johns. 66.

⁹ Ibid.

(a) An allegation of value is held not a material allegation, as it goes only to the quantum of damages. Its omission is cured by pleading over; but, if not put in issue, it is not to be taken as true. If, on proof, the damages are nominal only, the action may be maintained. Connors v. Meir, 2 E. D. Smith, 314.

Where the detention only is put in issue, and the plaintiff gives no evidence

of value, and a judgment is given for the sum alleged; the plaintiff can recover only the value proved. Ibid.

(b) In trover for a promissory note, it is not necessary to give notice to the defendant to produce the note. If shown to be in his possession or under his control, the action is notice. Bissel v. Drake, 19 Johns. 66.

an execution.¹ If the plaintiff's interest in the goods be not sufficient to sustain the suit, the proper plea is not guilty. And no special plea in bar can be good, unless it confess and avoid the conversion.²

§ 24 *a*. The statement of demand, in a suit by an administrator in a justice's court in Indiana, was substantially, that the defendant on, &c., had "swapped" a certain bay horse to A the intestate, and delivered the horse to him; and that the defendant afterwards took the horse into his possession, without the plaintiff's consent, and converted him to his own use, &c., to the plaintiff's damage, &c. Held, a sufficient statement in trover, and that it was too late after a plea to the merits to object to the statement of demand.³ But in New York, in an action for conversion, an answer, which denies each and every allegation in the complaint, is a denial not only of the conversion, but of the plaintiff's title; and under it evidence that the plaintiff had no title to the property is admissible.⁴

§ 25. The plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove, under "not possessed," that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt due to him from the plaintiff.⁵

§ 26. Trover by the assignee of A, an insolvent, for ten sets of harnesses, ten horses, &c. The defendant pleaded that the plaintiff, as assignee, was not lawfully possessed of the goods, &c., as of his own property as assignee; and also a plea, stating that, before the insolvent petitioned for his discharge, the defendant sold and delivered to him divers horses and harnesses, being the same as those mentioned in the declaration, for £150, on the terms that the defendant might at any time, until payment of the price, take and retain the horses and harnesses as a pledge and security for such part of the price as should remain unpaid, until payment thereof; that at the time of the alleged conversion £22, part of such price, remained due; and that, after the plaintiff became possessed as assignee, the defendant took the said horses and harnesses into his possession as such pledge and security, &c.; which is the conversion in the declaration mentioned. To this plea the plaintiff now assigned, that the action was brought, not for the supposed conversion in the plea mentioned, but for the

¹ *Pemberton v. Smith*, 3 Head, 18.

² *Coffin v. Anderson*, 4 Blackf. 395.

³ *Davis v. Davis*, 6 Blackf. 394.

⁴ *Robinson v. Frost*, 14 Barb. 539.

⁵ *Ringham v. Clements*, 12 Ad. & Ell. N. S. 260.

conversion of ten sets of harnesses, ten horses, &c., other than and different to those in the plea mentioned, &c.; to which the defendant pleaded not guilty. Held, that the plaintiff was entitled, under the new assignment, to give in evidence a conversion by the defendant of five horses, two of which were, and three were not, the subject of the agreement stated in the plea.¹ (a)

§ 27. With respect to the amount and measure of *damages* for conversion, the law cannot be considered as well settled. In general terms, the *value of the property* is the standard;² (b) but as to the elements which constitute that value, different cases adopt in many respects widely different views. Among the points of difference may be mentioned the following: The *time* at which the value is to be estimated; whether it is the actual time of conversion, or some subsequent period, at which the value would have been increased; (c) or, in other words, the *profits* which the plaintiff might have realized by retaining the property.³ So whether damages can be allowed for *detention*, and consequent loss of profits from the use of the thing, or the amount paid for the hire of others of like kind.⁴ So, whether the peculiar value of the property to *the plaintiff*, arising from personal considerations, can be estimated in the damages; as in case of a family picture.⁵ And, in general, whether the action of trover is distinguishable from that of trespass, in the exclusion of evidence of damages *merely in aggravation*, or vindictive damages.⁶ The allowance of *interest* is

¹ Bolton v. Sherman, 2 M. & W. 395.

² See Sturges v. Keith, 57 Ill. 451; Finch v. Blount, 7 C. & P. 478; Cook v. Hartle, 8 Ib. 568; Stevens v. Low, 2 Hill, 132; Parker v. Norton, 6 T. R. 695.

³ See Carter v. Feland, 17 Mis. 383; Hillebrand v. Brewer, 6 Tex. 45; Greening v. Wilkinson, 1 C. & P. 625; Whitehouse v. Atkinson, 3 Ib. 344; Shepperd v. Johnson, 2 E. 210; Shotwell v. Wendover, 1 Johns. 65; Kennedy v. Strong, 14 Ib. 128; Hallet v. Novion, Ib. 273; 16 Ib. 327; Greenfield, &c. v. Leavitt, 17 Pick. 1; Fowler v. Gilman, 13 Met. 267; Lillard v.

Whittaker, 3 Bibb, 92; Schley v. Lyon, 6 Geo. 530; Watt v. Potter, 2 Mas. 77; Read v. Fairbanks, 24 Eng. L. & Eq. 220; 13 C. B. 692; Wood v. Bell, 6 Ell. & Bl. 355; 5 Ib. 772.

⁴ Davis v. Oswell, 7 C. & P. 804; Bodley v. Reynolds, 8 Ad. & Ell. N. S. 779.

⁵ See Butler v. Hicks, 11 Sm. & M. 78; Hull v. Clark, 14 Ib. 187; Dennis v. Barber, 6 S. & R. 420; Berry v. Vantvies, 12 Ib. 89; Taylor v. Morgan, 3 Watts, 333; Harger v. M'Mains, 4 Ib. 418.

⁶ See Baker v. Wheeler, 8 Wend. 505; Whitehouse v. Atkinson, 3 C. & P. 344;

(a) In an action for conversion of 170 carboys of acid, an answer, alleging that the defendant had property of a like kind (175 carboys) in his possession, but is ignorant whether any portion of it was the property claimed, is a conclusive admission of possession, upon proof that the property therein mentioned is the property claimed; and the use of such averment as an admission of possession against the defendant does not render other allega-

tions in the answer evidence in his favor. Boston v. Moring, 15 Gray, 211.

(b) A general description, by witnesses, of chattels for which the suit is brought, is sufficient, if enabling the jury to estimate their value, to authorize a verdict for actual damages. Hall v. Burgess, 5 Gray, 12.

(c) In a late case held to be the highest value between the conversion and the trial. Matthews v. Coe, 56 Barb. 430.

another point in the question of value.¹ Another question relates to the measure of damages, where the precise quality of the article, as distinguished from others of the same general class, cannot be ascertained, in consequence of its non-production by the defendant.² So the qualified nature of the plaintiff's property may materially affect the amount of damages; as in case of pledge, lien, and other form of bailment.³ And, in general, various questions may arise as to the admissibility of evidence in *mitigation* of damages.⁴ Upon all these several points, as has been suggested, the authorities are somewhat conflicting; and it is foreign from our plan to do more than refer to the leading cases, which will be found in the margin.

§ 28. The question has often arisen, whether a party, who has once done an act which might amount to conversion, can avoid his liability therefor by subsequent restoration of, or satisfaction for, the property. (a) Thus, where the defendants had in their possession a boiler belonging to the plaintiffs, and the plaintiffs demanded it, and the defendants at first refused to restore it, but afterwards, and before the issuing of the writ, tendered it; held, no conversion.⁵ So, if a slave was hired for a particular service, and afterwards employed in a different one, this was held a conversion; but if, with full knowledge of the conversion before the expiration of the term, the master received the stipulated hire for the entire term, he was estopped from afterwards bringing trover.⁶ So where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after

Greening v. Wilkinson, 1 Ib. 625; Alder v. Keighly, 15 M. & W. 117.

¹ See Cutter v. Fanning, 2 Clarke (Iowa), 580; Bank, &c. v. Reese, 26 Penn. 143; Mercer v. Jones, 3 Camp. 477; Dillenback v. Jerome, 7 Cow. 294; Hyde v. Stone, 7 Wend. 354; Bissell v. Hopkins, 4 Cow. 53; Baker v. Wheeler, 8 Wend. 505; New Orleans, &c. v. De Lizardi, 2 La. Ann. 281; Stevens v. Low, 2 Hill, 132; Jacoby v. Laussat, 6 S. & R. 350.

² See Armory v. Delamirie, 1 Str. 505.

³ See Jarvis v. Rogers, 15 Mass. 389; Stearns v. Marsh, 4 Denio, 227; Ingersoll v. Van Bokkelen, 7 Cow. 670; 5 Wend. 315; Lyle v. Barker, 5 Binn. 457; Davidson v. Gunsolly, 1 Mich. 388; Horton v.

Reynolds, 8 Tex. 284; Haughton v. Benbury, 2 Jones, Eq. 337; Fowler v. Gilman, 13 Met. 267; Chamberlin v. Shaw, 18 Pick. 278.

⁴ See Mountford v. Gibson, 4 E. 441; Baldwin v. Porter, 12 Conn. 473; Locke v. Garrett, 16 Ala. 698; Mullen v. Ensley, 8 Humph. 428; Harker v. Dement, 9 Gill, 8; Carter v. Streater, 4 Jones, 62; Callanan v. Brown, 31 Iowa, 333; Whitney v. Beckford, 105 Mass. 267; Delany v. Hill, 1 Pittsb. 28; Johnson v. Tanglinger, 31 Iowa, 500; Ball v. Liney, 48 N. Y. 6.

⁵ Hayward v. Seaward, 1 Moo. & S. 459.

⁶ Moseley v. Wilkinson, 24 Ala. 411.

(a) See Cook v. Hartle, 8 C. & P. 568; Murray v. Burling, 10 Johns. 172; Reynolds v. Shuler, 5 Cow. 323; Kaley v. Shed, 10 Met. 317. A payment, in good faith, of the proceeds of the property con-

verted, for the owner, of which he has received the benefit, may be given in evidence in mitigation of damages. Doolittle v. McCullough, 7 Ohio, N. S. 299.

an action of trover had been commenced by them, and the plaintiffs accepted the goods without condition; held, they could not recover in the action more than nominal damages; at all events, not without alleging special damage.¹ So a cow, going at large in the highway without a keeper, joined a drove of cattle, without the knowledge of the driver, the defendant, and was driven to a distant place, and there pastured with the other cattle. The plaintiff, the owner of the cow, called on the defendant, after his return, made inquiries, and demanded the cow, and, on the return of the drove, a few months afterwards, the defendant delivered the cow to the plaintiff, who received her. Held, the omission to deliver the cow on demand was not evidence of a conversion.²

§ 28 *a*. But the general doctrine is laid down, that a temporary conversion will render a defendant liable; for a conversion which has once taken place cannot be cured; although a redelivery after conversion may go in mitigation of damages.³ So where personal property is sold, on condition that the title shall not vest until payment of the price; if, after the time of payment has expired, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to an action of trover for the property, by tendering to him the price and interest. And in such action, brought against the attaching creditor, the rule of damages is the value of the property at the time of the attachment.⁴ So the defendant in trover cannot justify the detaining of goods, for money laid out upon them without authority; but it may be deducted in damages.⁵ So where the plaintiff in trover unconditionally receives the goods in question, after suit brought, he is nevertheless entitled to recover the excess in value at the time of conversion above the value at the time of delivery, without an averment of special damage.⁶ (*a*)

¹ Moon v. Raphael, 2 Bing. N. R. 310.
See Hall v. Goodson, 32 Ala. 277.

² Wellington v. Wentworth, 8 Met. 548.

³ St John v. O'Connell, 7 Port. 466.

⁴ Buckmaster v. Smith, 22 Vt. 203.

⁵ Stone v. Lingwood, 1 Str. 651.

⁶ Rank v. Rank, 5 Barr, 211.

(*a*) In this connection we may refer to certain points of *practice* in the English and American courts, more particularly relating to the action of trover. It has been held, that the court will not stay proceedings in an action of trover, on the terms of the defendant's delivering up the goods to the plaintiff, or paying their value, where such value is not ascertained. Tucker v. Wright, 11 Moore, 500.

And, in trover for money, the court gave leave to bring the whole money de-

clared for into court; but said they could only do it in this case, and not in trover for goods. Anon., 1 Strange, 142.

In trover for slaves, the jury found for the plaintiff \$2700, "which can be satisfied by delivering to the plaintiff the said slaves within ten days." The defendant did not deliver them, and two of them sickened and died within ten days. Held, that a delivery of the rest after the time did not justify a set-off of their value, and that of those who died, upon an execution

on the verdict. *Willis v. Willis*, 22 Geo. 290. See *Fisher v. Prince*, 3 Burr. 1363; *Earle v. Holderness*, 4 Bing. 462; *Shotwell v. Wendover*, 1 Johns. 65; *Stevens v. Low*, 2 Hill, 132; *Whitten v. Fuller*, 2 H. Bl. 902.

The county court (in Vermont) has the power, in an action of trover, to permit by order the return of the property in mitigation of damages, and, on payment of costs by the defendant, to order that the plaintiff shall thereafter proceed at his peril as to subsequent costs. *R. & W. &c. v. Bank, &c.*, 32 Vt. 639.

This power, though in proper cases discretionary, cannot be used when the defendant has acted wilfully in taking or keeping the property, when the property has deteriorated, or when its value is in dispute; but may be, though the plaintiff claims damages, either general or special, beyond the value of the property. *Ibid.*

The plaintiffs, a railroad company, deposited with the defendants its own mortgage bonds, payable to bearer, to be held, upon the performance of a certain condition, for a specified purpose. This condition was not performed, but the defendants in good faith claimed to hold the bonds for another purpose, and refused to surrender them on demand. These bonds were never worth above par, but, after their conversion by the defendants, they greatly depreciated in market value. The plaintiffs brought trover for the bonds, alleging, in addition to general damage, that they had been deprived of the means of negotiating them, and had been put to expense in raising funds to relieve their property from attachment. Before trial, the defendants offered in court to deliver the bonds to the plaintiffs, and pay them

their costs already accrued, and the county court made an order, allowing them to bring such bonds and costs into court for the plaintiffs, and that, if the latter refuse to receive them, they must proceed at their peril as to subsequent costs, unless they succeeded in recovering more than nominal damages above the face of the bonds. Held, the case was one proper for the exercise of the power of the court to make such order in their discretion. Also, the defendants having complied with this order, and the plaintiffs having refused to accept such compliance as a satisfaction of the suit, but having proceeded to trial, and proved no facts materially different from those appearing when the order was granted; they were entitled to recover only nominal damages. *Ibid.*

It is held in a very late case to be no defence to an action for conversion, that the plaintiff has regained possession. He may recover at least the damage sustained by deprivation of the use, and the expense of regaining possession. *Sprague v. M'Kinzie*, 63 Barb.; *Am. Law Reg.*, Feb. 1873, p. 126.

In trover for furniture, the parties agreed and made it a matter of record, that certain articles sued for should be retained by the defendant, and certain others should be delivered to the plaintiff on demand, and for such as he did not so deliver, he was to pay the plaintiff, and also to pay the taxable costs. Held, the demand and refusal, and value of the articles, having been ascertained by the report of an auditor, the court would direct a judgment for the amount found and costs. *Blain v. Patterson*, 47 N. H. 523.

CHAPTER XXVI.

FRAUD.

- | | |
|--|---|
| 1. Must be connected with <i>contract</i> .
2. General principles; what constitutes an actionable fraud.
5. Fraud of a <i>seller</i> .
7. Fraud of <i>purchaser</i> ; whether creditors | and subsequent purchasers are affected by such fraud; when a seller loses his right of action.
11. False recommendation of credit, &c. |
|--|---|

§ 1. ANOTHER tort or wrong to *property* is *Fraud*. This, from its very nature, can exist only in connection with some form of *contract*, and was therefore incidentally considered at some length under the head of *torts as connected with contracts*. (See chap. 1.) Moreover, fraud is much more frequently set up as a defence to a suit at law, or in equity relied upon as a ground for rescinding or setting aside an executed or executory agreement, than made the foundation of a distinct action for damages. (a) For these reasons, it does not require to be noticed, in the present connection, at great length.

§ 2. Fraud or deceit, accompanied with damage, is a good cause of action.¹ In some instances there may be a legal fraud, even without an intention to deceive.² (b) And, on the other hand, a

¹ Castleman v. Griffin, 13 Wis. 535; Barney v. Dewey, 13 Johns. 224; Morgan v. Bliss, 2 Mass. 111; Farrar v. Alston, 1 Dev. 69; Ide v. Gray, 11 Vt. 615.

² Murray v. Mann, 2 Exch. 538. See

Moens v. Heyworth, 10 M. & W. 147; M'Donald v. Trafton, 15 Me. 225; Cunningham v. Smith, 10 Gratt. 255; Elton v. Larkins, 5 C. & P. 86.

(a) As to the right of imprisonment for fraud, see M'Cool v. The State, 23 Ind. 127; chap. 31.

Positive fraud vitiates every thing, — contracts, obligations, deeds, and even records and judgments; and contracts entered into upon fraudulent representations are voidable at the election of the party defrauded. If one party designedly misrepresent a material fact, which it was his duty to disclose, and upon which the other had a right to rely, and did rely, for the purpose of misleading and deceiving the latter, to his injury, he is guilty of a positive fraud, which will authorize the latter party to avoid the contract. Jones v. Emery, 40 N. H. 348.

When a contract, expressly and intentionally fraudulent, has been made, no

subsequent payment or advance will give validity to it. If any part of the original purpose is fraudulent, the whole may be avoided, though made upon sufficient consideration. So if any part of the fraudulent purpose remains, it vitiates the whole. Lynde v. M'Gregor, 18 Allen, 172.

If a representation be made materially affecting the subject-matter of a sale, which, at the time was known to be false in fact, it is no answer to the fraud, that the injured party may have redress in another form, upon the covenants of his deed. Gwinther v. Gerding, 3 Head, 197.

(b) As to the effect of a mere *fraudulent intent*, see Canham v. Barry, 29 Eng. L. & Eq. 290; Abbey v. Dewey, 25 Penn. 413.

The gist of an action for wilful and

representation may be fraudulent, though *literally true*, if it deceives, and is intended to deceive.¹ And where one party designedly produces a false impression, in order to mislead, entrap, or obtain undue advantage over another, there is fraud, — an evil act, with an evil intent.² Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue unconscientious advantage is taken of another.³ It is often a *conclusion of law*, which courts will infer from acts and circumstances, whether the existence of a fraudulent purpose, in the strict sense, be proved or not.⁴ But fraud is not to be presumed from the provisions of an instrument which admits of a contrary construction.⁵ And it is said, *fraud is never to be presumed*; it must be *clearly proved* by the party making the charge, for the presumption of law is always against bad faith.⁶ (a) And it is to be further remarked, that the law will not lend its aid to either of the parties to a fraud-

¹ Denny v. Gilman, 26 Me. 149.

² Peter v. Wright, 6 Ind. 183.

³ Gale v. Gale, 19 Barb. 249.

⁴ Story v. Norwich, &c., 24 Conn. 94; Bryant v. Simoneau, 51 Ill. 324; Polhill v. Walter, 3 B. & Ad. 114; Hart v. Tallmadge, 2 Day, 381; Freeman v. Baker,

5 B. & Ad. 797; Arnold v. Maynard, 2 Story, 352.

⁵ Bank, &c. v. Talcott, 22 Barb. 550.

⁶ Stewart v. English, 6 Ind. 176; 35 Barb. 630; Coulson v. Coulson, 5 Wis. 79; Flint v. Jones, Ib. 424; Gay v. Peacock, 41 Geo. 84.

fraudulent representations and concealments is the actual evil intent of the defendant, which, however, is not a necessary conclusion of law from his acts. It is therefore competent for him to testify that he did not intend to cheat. Pope v. Hart, 35 Barb. 630.

(a) The burden of proof is upon a party alleging fraud. Stout v. Oliver, 40 Ill. 245.

The unsupported testimony of one of the parties to a sealed instrument is not sufficient to establish fraud in the execution of the instrument. Fusier v. Sneath, 3 Nev. 120.

But, to prove fraud in a civil action, the evidence need not preclude a reasonable doubt. Strader v. Mullane, 17 Ohio St. 624.

Facts or circumstances in their nature inconsistent with good faith, when shown to exist, necessarily tend to prove fraud; and though the jury must judge of their weight, it is clearly within the province of the court to instruct the jury as to this tendency. But it is error to instruct them that facts, proper and innocent in themselves, tend to prove fraud, or that fraud may be inferred from their existence.

Kane v. Drake, 27 Ind. 29; Blair v. Alston, 26 Ark. 41; 105 Mass. 528. See Picot v. Bates, 47 Mis. 390.

Evidence, that the defendant made \$2100 during six months that he kept a boarding-house alone, and that the expenses were less and the receipts more than when it was kept by the plaintiff and himself together, are not admissible to prove that the plaintiff was guilty of a fraud in returning a less sum as the profits for six months in which it was kept by them together. Thayer v. Barney, 12 Minn. 502.

The fraudulent intent of an act may be shown by proof of a subsequent fraudulent act, when both form parts of one transaction. In an action by assignees in insolvency, to recover the value of property alleged to have been conveyed to the defendant by the insolvent in fraud of creditors, evidence, that other property was conveyed by him to the defendant in a manner indicating the same purpose, or in a form which would admit a fraudulent claim, afterwards made, is admissible to establish the general fraudulent purpose, whether the fraud was successful or not. Lynde v. McGregor, 13 Allen, 172.

ulent executory contract in enforcing the same, nor to rescind or disturb one which has been executed, founded in immorality, or upon transactions forbidden by law.¹ (See chap. 4.)

§ 3. In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood, with the design to deprive the plaintiff of a benefit and acquire it to himself; and damage naturally flowing from the plaintiff's belief. (a) Thus a declaration in case stated, that the plaintiff was a printer of silk goods, and had delivered to the defendant a lot of such goods, in which were woven fabrics of silk, printed by the plaintiff with a design for the ornamenting of them, which had been published by the plaintiff to the defendant and others; and the plaintiff was about to print other fabrics of silk with the same design, and to publish the same in the way of his trade for gain; of all which the defendant had notice; but the defendant, con-

¹ Westfall v. Jones, 23 Barb. 9.

(a) See chap. 1, upon the question, whether it is as much a fraud, when making a sale, to assert that which is not known to be true, as to assert what is known not to be true. See also, that it is, *Bennett v. Judson*, 21 N. Y. (7 Smith) 238; *Craig v. Ward*, 36 Barb. 377. But see *Holmes v. Clark*, 10 Iowa, 423; *Courtney v. Carr*, 11 Ib. 295.

Recent cases are as follows:—

Misrepresentation of a material fact, whether intentional or by mistake, if it actually deceives, is legal fraud. *Terhune v. Dever*, 36 Geo. 648.

In an action of deceit it is indispensable that a *scienter* be both alleged and proved. *Wooten v. Calehan*, 32 Geo. 382.

A complaint in an action for false representations must aver that the defendant made the representations with an intent to deceive and defraud the plaintiff. *Barber v. Morgan*, 51 Barb. 116.

The complaint, in an action for fraud in the purchase or sale of property, induced or procured by false representations, must in substance state the representations, and aver their falsity, and that they were made with intent to deceive the plaintiff, and induce him to make the purchase or trade, and that they did induce such trade, to the plaintiff's injury. *Ibid.*; *M'Alcer v. Horsey*, 35 Md. 439.

Some late cases attach less weight to the *scienter*. *Meyer v. Amidon*, 45 N. Y. 169. Or hold that, although for want of it an action at law may not lie, equity will relieve. *Wilcox v. Iowa*, 32 Iowa, 367.

An action for fraudulent representations is not supported by proof of prom-

ises by the defendant for future conduct, although he intended to repudiate them; but the representations must refer to existing facts. *Gray v. Palmer*, 2 Rob. (N. Y.) 500; 55 Penn. 504.

Substantially the same proposition is, that fraud consists of false representations of things as facts which are not such, or deceitful concealment of facts. A promise is not in itself a false and deceitful representation; performance may have been intended by the promisor. *Grove v. Hodges*, 55 Penn. 504.

A railroad obtained conveyance of a right of way without pecuniary compensation and under representations alleged in equity to be fraudulent. Held: 1. Evidence was admissible, to show what statements and promises for the purpose of procuring such right of way were made or adopted by agents of the company at public meetings and elsewhere, and the non-fulfilment of such promises. 2. That if the jury found the conveyance was procured by such representations and would not have been executed without them; they might set aside the contract for fraud, assess the damages sustained by the use and occupation of the land conveyed, find the former value thereof, and by their verdict, confirm the right of way. *Atlanta v. Hodnett*, 36 Geo. 669. See, further, *Hiner v. Kichter*, 51 Ill. 299; *Marshall v. Gray*, 57 Barb. 414; *Byard v. Holms*, 34 N. J. L. 296; *Masterton v. Beers*, 1 Sweeny, 406; *Fisher v. Mellen*, 103 Mass. 603; *Fox v. Webster*, 46 Mis. 181.

triving to deceive, injure, and defraud the plaintiff, and induce him to desist from printing more with the design, and to deprive him of the gains he would have made, and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of the defendant, and to put the plaintiff to expense; falsely, fraudulently, and deceitfully represented to the plaintiff that in the lot there was a copy of a registered pattern (see Stats. 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65), and that, the parties having asked the defendant for the printer, the defendant was obliged to give the plaintiff's name; and the parties intended to proceed against the plaintiff by injunction and order through the Court of Chancery (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the statutes respecting copyrights of designs, and that the parties interested in the design had asked the defendant who was the printer, and the defendant had been obliged to give the plaintiff's name as printer, and the parties intended to proceed against the plaintiff, to prevent him from pirating the design, by injunction and order through the Court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered according to the statutes aforesaid; and there were no parties interested in the design; nor had any parties asked the defendant for the printer; nor had the defendant given them the plaintiff's name; nor did any parties intend to proceed against the plaintiff by injunction, &c., as the defendant, at the time of making the representation, knew; by means of which representation the plaintiff, believing it to be true, was induced to travel a long distance for the purpose of inquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances; and was induced to abstain from further printing with the design, which he had orders to do, and from selling silk handkerchiefs printed with the design; and the defendant, by means of the premises, enjoyed the benefit of the design to the exclusion of the plaintiff, and printed with the design, and sold, for his profit, silk handkerchiefs, and took the profits, without the competition of the plaintiff, and to his exclusion. On general demurrer, held, that the declaration showed a cause of action; and that the innuendo was unnecessary, and could not therefore be the ground of an objection to the declaration.¹ Upon similar ground, if mortgaged goods are attached

¹ *Barley v. Walford*, 9 Ad. & Ell. N. S. 197.

conformably to a statute in a suit against the mortgagor, and the mortgagee, in pursuance of the statute, demands payment of the attaching creditor, knowing that his claim is wholly false, and thereby induces the creditor to abandon his attachment, and thus lose his debt; he is liable to such creditor for the damages sustained, in an action for the deceit.¹ (a)

§ 4. But, in an action for fraud, the plaintiff will be confined to the precise ground of action set forth in his declaration. Thus, in an action on the case against the defendant, for falsely representing that he had funds in his hands, for which he was chargeable as the trustee of a debtor of the plaintiff, whereby the plaintiff was induced to sue out a trustee process, from which the defendant was discharged on his answer; the plaintiff cannot prove that the defendant's statement, on oath, in his answer, that he had no funds, was false.² So an action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained, by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact of not paying the toll on demand, afterwards, when the corn was delivered to the defendant in the same borough, but out of the market: for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such pur-

¹ *Brown v. Castles*, 11 Cush. 348.

² *Merrill v. Gold*, 1 Cush. 457.

(a) Where one holding a promissory note of an insolvent person has by a fraud passed it to an innocent purchaser, he is liable to refund the money received for it, with interest. *Clayton v. O'Conner*, 35 Geo. 193.

A complaint alleged, that the defendant represented to the plaintiff, that a certain company was duly organized as a corporation with a large capital stock, and that the shares in it were at par; that the company was working its own mines, which were very valuable and yielding immensely; that the company would without doubt pay quarterly dividends, in gold, of six per cent; that the stock was so valuable that it could hardly be

obtained; and he knew each and every one of such statements to be true. Also that he urged the plaintiff to purchase through him a certain number of shares, which he did, and paid for, believing the statements. Also that he knew each and every one of such statements to be untrue. Held, 1. That all the allegations together imputed and implied a fraud, purposely and intentionally committed. 2. That the plaintiff need only prove these representations, that he was thereby induced to purchase, and that the defendant knew them to be false, with proof of damages. *Barber v. Morgan*, 51 Barb. 116.

chase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold.¹

§ 5. We have already (chap. 1) considered at some length the wrong of fraud or deceit in the contract of *sale*. It may be here added, that an action on the case may be maintained by the purchaser or lessee of lands against the seller or lessor, for fraudulently misrepresenting the *boundaries* of the lands. And the intent to defraud need not be established by direct proof, but may be made out by circumstantial or presumptive evidence. So a vendor of real estate is guilty of fraud, if, knowing that he has no title to a portion of the land sold, he wilfully suppresses that fact.² So also a vendor of land is held liable for a false representation as to its location, if the purchaser have not at the time an opportunity of seeing the land. Or for a misrepresentation as to the cost of the land. But not for a mere expression of opinion of its value.³ So it has been held, that, even in case of the *gift* of a chattel, which the donor affirms to be his, if the donee is afterwards evicted by the rightful owner, he may maintain an action against the donor.⁴ And the false representation, in cases of this nature, need not always have been made directly to the plaintiff himself. Thus the defendant, being about to sell a public house, falsely represented to A, who had agreed to purchase it, that the receipts were £180 a month; and A, with the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of A. Held, this action for fraud might be maintained.⁵ (a) But one can claim damages for fraud in the sale of personal property, only where some injury or loss results from the fraud.⁶

§ 6. In case of fraudulent *warranty*, the buyer may sell the

¹ *Tewkesbury, &c. v. Diston*, 6 E. 438.

² *Clark v. Baird*, 5 Seld. 183; *Whitney v. Allaire*, 1 Comst. 305.

³ *Sandford v. Handy*, 23 Wend. 260.

But see *Sandford v. Halsey*, 2 Denio, 235.

⁴ *Barney v. Dewey*, 13 Johns. 224.

⁵ *Pilmore v. Hood*, 5 Bing. N. R. 97.

⁶ *Whitson v. Gray*, 3 Head, 441.

(a) If the owner of a lease employs another to greatly exaggerate its value to the landlord, and to agree to purchase the whole property of him at more than its value, if he would buy the lease from the owner, for the purpose of defrauding the landlord into a purchase of the lease; such exaggerated statements of its value cannot be excused as mere "puffing," such as a vendor is allowed to make use of. Neither does the readiness with which the landlord acceded to the suggestion, though

he knew the price at which the other party proposed to purchase was too high, excuse the fraud on the part of the confederates. *Adams v. Soule*, 33 Vt. 538.

Persons placing petroleum oil on lands, thereby inducing the belief that the oil was the production of the lands, are jointly and severally liable; evidence therefore which implicates one only is admissible, and will justify a verdict against one alone. *Chester v. Dickerson*, 52 Barb. 349.

property for the best price he can obtain, without first offering to return it; and, if he act with common prudence and discretion in disposing of the property, the rule of damages, in an action for deceit brought by him against the seller, will be the difference between the price which he obtained, and what the property would have been worth if it had been as warranted.¹ Or, in case of fraud in a sale on the part of the seller, the buyer may rescind the sale, and recover back the consideration paid, in an action for money had and received. But he must restore, or offer to restore, all that he has received under the contract. He cannot rescind in part and affirm as to the residue, even where the sale is of several articles at distinct prices for each.² (a)

§ 7. While a *seller* is liable to an action for fraud in the sale, on the other hand (see i. 18), a sale and delivery of goods, procured through a false representation of *the buyer* in regard to his solvency and credit, passes no title as between the parties; and the seller or his representatives may maintain either trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, against him. It is held, that, as the general and absolute ownership remains in the vendor, not only the original interference on the part of the purchaser with the property, but also any subsequent acts of ownership by him, may be treated as an unlawful and tortious taking.³ The purchaser is held to be in all respects liable to be treated as a trespasser; and he cannot avail himself of the conveyance to justify the taking, any more than the detention, of the property.⁴ And a sale of goods procured by the fraud of the vendee is equally void, as between the parties, whether the fraud be indictable or not.⁵ So where a *creditor*, by fraud or deception, obtains the goods of his debtor, the property is not changed, and he cannot apply them to his debt, but the debtor may maintain trover against him.⁶ And where the question is, whether a purchaser of goods procured them through fraud, distinct purchases made by him of others, under

¹ Woodward v. Thacher, 21 Vt. 580.

² Voorhees v. Earl, 2 Hill, 288.

³ Cary v. Hotailing, 1 Hill, 311. See Roberts v. Randel, 3 Sandf. 707; Thompson v. Rowe, 16 Conn. 71.

⁴ McKnight v. Morgan, 2 Barb. 171.

⁵ Cary v. Hotailing, 1 Hill, 311.

⁶ Woodworth v. Kessain, 15 Johns. 186.

(a) A complaint averred, that, to induce the plaintiff to purchase a horse, the defendant falsely and fraudulently represented the horse to be worth \$120, and guaranteed him to be sound in all respects, and free from disease; that he was not sound, and not worth \$120, but

was unsound and had a disease well known to the defendant at the time of the sale. Held, that this was an action for deceit, and not for a breach of warranty; and could not be sustained without proof of a *scienter*. Moore v. Noble, 53 Barb. 425.

similar circumstances, at or about the same time, and when the like motive as the one imputed may be reasonably supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*.¹ But where the purchaser, being insolvent, but *not knowing the fact*, represents to the seller that he is able to pay one hundred cents on the dollar and something more, and thereby induces him to sell him goods; the sale is not void for misrepresentation.² Nor where the seller is not induced to enter into the contract by the false representations of the purchaser.³ And where there is an attempt to impeach the good faith of a purchaser, on the ground of fraudulent suppression of information obtained from a letter, he may show the contents of the letter to repel the presumption of fraud.⁴

§ 8. It has been held, that a *preconceived design not to pay for goods purchased* is such a fraud as will avoid the sale.⁵ So the plaintiff, having sold merchandise to the defendants, sent to them, four days afterward, the measurer's return, and a bill, and upon the following day demanded payment, when the defendants promised to pay the bill the next week, but within one day afterward became insolvent. Held, *prima facie* evidence of the falsity of representations of solvency made at the time of the purchase.⁶ But the mere facts, that a purchaser of goods in general good standing has allowed certain accommodation notes to lie over, in order to compel the party accommodated to take them up, and has given goods as security for taking them up, and has also given goods as security for a loan, after exhausting his credit for money without security, will not sustain an allegation, that the purchase was fraudulent.⁷

§ 9. It is to be further remarked, that a party who obtains the goods from the fraudulent purchaser, without notice of the fraud, in the usual course of trade, — that is, who gives value for them, makes advances upon them, incurs responsibilities upon the credit of them, or receives them in pledge for money or property loaned upon the strength of them, — may hold the goods against the vendor, being a *bona fide* purchaser.⁸ Although it has been questioned, whether contracts of sale procured by fraud are always

¹ Cary v. Hotailing, 1 Hill, 311. See Ferguson v. Carrington, 9 B. & C. 59; Load v. Green, 15 M. & W. 216.

² McCrackan v. Cholwell, 4 Seld. 133.

³ Bronson v. Wiman, 4 Seld. 182.

⁴ Ibid.

⁵ Ash v. Putnam, 1 Hill, 302. But see Stevens v. Hyde, 32 Barb. 171.

⁶ Smith v. Frank, 2 Rob. (N. Y.) 626.

See Skinner v. Flint, 105 Mass. 528.

⁷ Loeschigk v. Peck, 3 Rob. (N. Y.) 700. See Woods v. Gummert, 67 Penn. 136.

⁸ Root v. French, 13 Wend. 570; Mowrey v. Walsh, 8 Cow. 238. See Brush v. Scribner, 11 Conn. 388.

binding, even as in favor of *bonâ fide* purchasers;¹ it being laid down as the general rule, that a vendee of goods, who by reason of fraud in the purchase has acquired no title against the vendor, can convey none.² And this rule is still so far adopted, that a transfer of the goods by assignment to a *bonâ fide* creditor of the original purchaser, in payment of a pre-existing debt, will not vest the title in such creditor. On the contrary, if the creditor detains the goods after demand, the vendor may maintain replevin against him.³ And it is sufficient to impeach the *bona fides* of a purchase of chattels from a fraudulent vendee, that the purchaser had notice of such facts and circumstances, as would naturally excite the suspicion of a man of ordinary prudence and caution, and forbore to make inquiry.⁴ (a)

§ 10. But it is to be further stated, that an action for deceit cannot be maintained, by a party who has himself been wanting in reasonable care; more especially in the absence of any express misrepresentation. Where both parties have equal means of knowledge, the law will not protect the negligent party in case of misrepresentation by the other.⁵ Thus where a note was taken for a horse, in a trade between A and B, and A took the note after B's conversation had thrown suspicion upon it, and also after his refusal to indorse it: held, in an action by A for deceit against B, that, as A had taken the note at his own risk, the rule of *caveat emptor* must apply; and, unless B appeared to have used some artifice or practice to conceal the defects in the note, he was not liable for deceit.⁶ And it is to be further remarked, that the rights

¹ Cary v. Hotaling, 1 Hill, 311.

² Ash v. Putnam, *ib.* 302.

³ Root v. French, 13 Wend. 570.

⁴ Danforth v. Dart, 4 Duer, 101.

⁵ Bell v. Byerson, 11 Iowa, 233.

⁶ Smith v. Andrews, 8 Ired. 3. See Moore v. Turbeville, 2 Bibb, 602; Saunders v. Hatterman, 2 Ired. 32.

(a) A member of an insolvent partnership at Syracuse, consisting of two persons, purchased goods in Philadelphia on the credit of the firm, under a misrepresentation of its circumstances. The goods were forwarded to Syracuse, but, before they arrived, the partner not privy to the purchase apprised the vendors by letter of the insolvency of the firm, and, among other things, declared the goods subject to their order. The vendors then immediately took steps to reclaim the goods, and actually succeeded as to a part. The residue, however, before the vendors found them, were seized and sold by the sheriff of Schenectady, while lying in a warehouse at that place. In an action by the vendors against the sheriff,

held, that the case should have been submitted to the jury on the question, whether there was such fraud in the purchase as avoided the sale; and a new trial was granted, because the circuit judge nonsuited the plaintiffs. Ash v. Putnam, 1 Hill, 302.

In regard to the *materiality* of representations alleged to be fraudulent, see Geddes v. Pennington, 5 Dow. 164; Green v. Gosden, 4 Scott, N. R. 13; 3 M. & G. 446; Vane v. Cobbold, 1 Exch. 798.

The question is held to be for the jury. Huguenin v. Rayley, 6 Taunt. 186; Bidault v. Wales, 20 Mis. 546; Westbury v. Aberdeen, 2 M. & W. 267; Lindeneau v. Desborough, 8 B. & C. 586.

and claims, either of buyer or seller, against the other party to the contract, on the ground of fraud, may be lost by *waiver* or *acquiescence*. Thus where a sale of goods is procured by fraud, the vendor still retains his legal right in them, unless, after discovering the fraud, he assent to the sale, either positively, or by such delay in reclaiming the goods as authorizes the inference of an assent.¹ (a) And his subsequent declarations may be proved, to show an affirmance of the contract, with full knowledge of the facts.² So if the party has himself received property in exchange for the property parted with by him, by means of alleged fraud, he must return or offer to return the property received, before he can maintain an action for his own property; unless the other party has by his acts or declarations waived the right to such return. Upon this ground, a party to an exchange of horses, who is deceived by false representations, cannot maintain an action of replevin for his horse, against the party who deceived him, until he has rescinded the contract, and returned, or offered to return, the horse received by him. Thus, on an exchange of horses by A and B, A was deceived by B's false representations, and sued out a writ to replevy the horse delivered by him to B, and went with an officer to B's premises, and there left the horse received of B, without any communication with B. The officer then took the other horse on the writ, and afterwards read the writ to B; and A at the same time informed B that his horse was returned. Held, the action of replevin could not be maintained, it being commenced before the contract was rescinded by the return of B's horse. But, on another trial, it further appeared, that, A and B having exchanged horses, on a false representation by B that his horse was kind; on a trial of the horse in the presence of B, the horse was found to be unkind, and B requested A to make a further trial, which A refused to do. B then promised A that he would meet him on the next Monday, and "make all right, and settle

¹ *Ash v. Putnam*, 1 Hill, 302.

² *Bronson v. Wiman*, 4 Seld. 182.

(a) That, in order to constitute a *legal* fraud, available either as a defence or a ground of action, the party must have been deceived, and acted in consequence of the fraud; see *Taylor v. Fleet*, 1 Barb. 471; *Stafford v. Newsom*, 9 Ired. 507; *Tuckwell v. Lambert*, 5 Cush. 23; *Ad-dington v. Allen*, 11 Wend. 375; *Young v. Hall*, 4 Geo. 95; *Clopton v. Cozart*, 13 Sm. & M. 363; *Connersville v. Wadleigh*, 7 Blackf. 102; *Anderson v. Burnett*, 5 How. (Miss.) 165.

Representations, which will entitle a party to recover on the ground of deceit, must be both false and fraudulent, and such as to induce, and did induce, the plaintiff to part with his money. The instrument of alleged fraud must not only be fraudulent in its representations, but intended to defraud the plaintiff, or the plaintiff and all others. *McAleer v. McMurray*, 58 Penn. 126.

the affair of the horses." On Monday, B sent a message to A that he would not take the horse back. A thereupon sued out a writ of replevin against B, without any further communication with him, and took the horse which he had delivered to B in exchange. Held, the action of replevin might be maintained; as a jury would be warranted in finding, either that A had offered to return the horse to B, and that an answer had by mutual consent been postponed till Monday, and that B's message on that day was a refusal of that offer; or that the message was an express waiver of any further offer to return the horse.¹ And, in regard to *waiver*, it may be further remarked, that where, in case of misrepresentation, by a lessor, for example, as to the territorial limits of the property, the lessee takes possession at the commencement of the term, and after having discovered the fraud; he waives thereby only his right to rescind the contract, but not to recover damages for the fraud.² So, in case of a purchase of personal property, a party does not waive his right to damages, by merely acting in affirmance of the contract after discovery of the fraud.³ (a) More especially a party is not precluded by mere acts of acquiescence from setting up fraud as a *defence*. Thus A. executed a memorandum under seal, in February, stating that he had hired of W. a certain lot in the city of New York, for one year from the first of May next, for \$1000 rent. He was induced to make the contract, through the fraudulent representations of W., that the lot comprehended a certain other parcel of land, which, as it afterwards turned out, belonged to the corporation. A. discovered

¹ Thayer v. Turner, 8 Met. 550.

³ Allaire v. Whitney, 1 Hill, 484.

² Whitney v. Allaire, 1 Comst. 305.

(a) A, being deceived by false representations made to him by B, sold goods to B, and took his promissory note for the price. B sold part of the goods, and received payment therefor. A rescinded the contract of sale on the ground of the fraud, and brought an action against B to recover the money received by him for the goods, and directed the officer to attach B's property, but did not specify the property to be attached. The officer attached, on A's writ, and on other writs, against B, the residue of the goods sold to him by A, and A entered and prosecuted his said action. A afterwards gave notice to the officer that he had rescinded the sale, and, after demanding of the officer the goods attached, brought replevin against him. Held, A had not affirmed any part of the

sale, and might maintain the action. *Browning v. Bancroft*, 8 Met. 278.

The defendant sold the plaintiffs a machine, and agreed to show them the art of "so stringing the balls on the rim of the wheel as to produce a shifting motion of the centre of gravity and cause perpetual motion," but in fact only imparted to them the secret that the whole motion was produced by concealed clockwork. Thereupon the plaintiffs returned the machine, and demanded back the money paid; the defendant accepted it, and refused to refund. Held, the plaintiffs were entitled to recover the entire sum, though they disclosed the secret to other parties before the demand, and though the imposition would not have deceived men of ordinary prudence and judgment. *Kendall v. Wilson*, 41 Vt. 567.

the fraud before the first of May ; and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole, and occupied during the year. Held, in an action by W. for rent, that A. was entitled to a deduction, by reason of the fraud, of at least what he was in good faith obliged to pay for the corporation lease ; that A., immediately after discovery of the fraud, might have elected to treat the lease as entirely void ; not having done so, however, but having occupied under it during the term, his only remedy was by action or *recoupment* for the damages.¹

§ 11. Another instance of fraud or deceit, for which an action may be maintained, is that of the *false recommendation* of a third person, whereby the plaintiff has been led to trust him, and thereby suffer pecuniary loss. (See chap. 1, § 7.) A party inquired of in regard to A's solvency is under no obligation to make any representations, but, if he undertakes to do so, he is bound to speak truthfully ; if he knowingly conceal that A is then indebted to him in an amount nearly equal to his property, or speak of such debt as a mere trifle, in a manner calculated to quiet apprehension, he will be liable for goods sold on credit on the faith of such representations.² In cases of this kind, it is held not necessary to show an intent to defraud any particular individual ; but whoever is defrauded may maintain an action. (a) But, on the other hand, the defendant may show, that he believed the representations made, and was himself duped by the artifice of the person recommended.³ (b) Thus an action on the case for a false affirmation lies, where a certificate known to be false is given to an individual, that he is an honest, industrious, reputable, and otherwise good citizen, of good morals and habits, and that, in the opinion of the defendant, he would honorably endeavor to perform any engagement he should make, in any matter of business or credit ; if the person recommended, on the strength of such certificate, obtains

¹ *Allaire v. Whitney*, 1 Hill, 484.

³ *Williams v. Wood*, 14 Wend. 126.

² *Viele v. Goss*, 49 Barb. 96.

(a) But a right of action, for a false and fraudulent representation of the solvency of a purchaser, is held not *assignable*. Nor would it survive to the personal representatives of the party defrauded. *Zabriskie v. Smith*, 3 Kern. 322. See 4 Bosw. 564.

A fraudulent representation that a person is of good credit, whereby another is induced to sell him merchandise, or indorse his note, although made in order to enable him to pay a debt due from him to the person making the representation, is within the Statute of Frauds, and will not

support an action, unless in writing. *Kimball v. Comstock*, 14 Gray, 508 ; *Mann v. Blanchard*, 3 Allen, 386. See p. 147.

(b) A judgment for the maker, upon a plea of payment to the payee, in an action by an indorsee upon a note, is not conclusive evidence of the holder's right to maintain an action of tort against the payee for selling the note to him with a false representation that it was a good note and unpaid ; the *scienter* is of the gist of the action. *Sibley v. Hulbert*, 15 Gray, 509.

goods on credit. And evidence is admissible, that the party was insolvent and worthless when the certificate was given.¹ (a) So a party is held liable to an action, who, in bad faith, and with a view of inducing others to credit a merchant, represents that he has examined into his affairs, and considers him solvent and worthy of credit, and that he is going on well, when such merchant is in fact insolvent, and the party making the representations has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted.² So the responsibility of a party, for false and fraudulent representations, is not necessarily limited to the credit obtained thereby at or immediately subsequent to the time they were made. And where the representations were made in April, and the plaintiffs then, and at various times after, until November, sold the party merchandise on credit; held, it was for the jury to decide, whether the credits given during the summer and fall were induced by the representations.³ So a letter of B, the defendant, to the plaintiffs, written in German, stated that he had made over his "business, with debits and credits," to A, who would "continue the same with undiminished means" under the title of A, successor to B; and, after thanking the plaintiffs "for the confidence reposed" in him, B, hitherto, requested the plaintiffs' firm to extend the same to his successor. The sale by B to A was chiefly on credit, and A had no other capital than the stock and the good-will. Held, B was liable for goods subsequently sold by the plaintiffs to A on credit; that the word "means" was not to be confined to stock in trade, but included all resources necessary to continue the business to the same extent as before; and that the letter was substantially a representation, that A's pecuniary responsibility, for the purposes of the continued business, was as good as that of B; that subsequent letters from B to the plaintiffs, and their subsequent intercourse, &c., were properly admissible to show his intent in sending the letter; also the testimony of one of the plaintiffs as to his understanding of the letter, to show that he trusted A on the faith of it, though not to vary its meaning; also a subsequent verbal statement by B to

¹ *Williams v. Wood*, 14 Wend. 126.

³ *Ibid.*

² *Zabriskie v. Smith*, 8 Kern. 322. See *Westcott v. Wheeler*, 4 Bosw. 564.

(a) Whether or not it was proper for the judge, in charging the jury, to say that the insolvency and death of the person recommended was sufficient evidence that the debt had not been paid: yet, if he

added, that the jury must be satisfied, from all the testimony, that the debt had not been paid, there is no ground for a new trial. *Williams v. Wood*, 14 Wend. 126.

the plaintiffs, that he thereby meant to say that "the concern remained the same except a change of name," in corroboration of such interpretation of the letter; that the damages must be estimated by the value of the goods when sold; if payable in francs, at a period when gold was the only legal tender, the value of the franc in gold; and that, upon the question of construction, B did not stand upon the same footing with an honest guarantor claiming strict construction, so as to make him liable for only the first act of deception, but his liability extended to all future credits given by reason of the belief first effected.¹

§ 12. In an action for falsely and fraudulently representing a person as solvent, the complaint should aver substantially, although not necessarily in direct and technical language, and the plaintiff must prove, that the representations were made with intent to deceive and defraud. But a variance in some particulars between the fraudulent representations alleged and those proved is not material, unless the defendant prove at the trial that he was misled thereby to his prejudice.² And, in an action on the case for fraudulent representation as to the credit of another, though the statute requires the representation to be in writing, it is held that any evidence, parol or otherwise, is admissible to prove the representation false; and it is for the jury to say, upon all the facts, whether the representation was calculated to mislead and did mislead the plaintiffs.³

§ 13. Fraud may consist in a false assumption of authority.⁴

¹ *Von Bruck v. Peyser*, 4 Rob. (N. Y.) 514; ² *Ib.* 468.

² *Zabriskie v. Smith*, 3 Kern. 322.

³ *Iasigi v. Brown*, 17 How. 183. See p. 84, n.

⁴ *Dung v. Parker*, 3 Daly, 89.

CHAPTER XXVII.

WASTE.

- | | |
|---|---|
| 1. Applies only to real property. | 11. Change in the use of land. |
| 2. Definition. | 13. Buildings. |
| 3. Felling of timber. | 17. Remedies; parties; forms of action; |
| 10. Disturbance of the soil; mines, &c. | injunctio. |

§ 1. ANOTHER injury, peculiar both in nature, in the remedy provided for it, and the penalty to which it is subject, is *Waste*. (*a*) It is an injury exclusively applicable to real property; somewhat analogous in the nature of the act to *trespass*, but not technically a trespass, because committed by a party in possession, (*b*) and sometimes consisting in mere neglect or omission. The subject, as will be seen, is so extensively and variously regulated by the statutes of the several States, that the plan of the present work admits only a general view of the law relating to it. (*c*)

§ 2. Waste is defined, as "a spoil or destruction in corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail;"¹ or as the destruction of such things on the land, by a tenant for life or for years, as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.² It is said, "If the tenant for life or for years should by neglect or wantonness occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, as by pulling down houses; suffering them to go to decay from the want of ordinary care; cutting the timber unnecessarily, opening mines, or chang-

¹ 2 Greenl. Ev. § 650; 2 Bl. Com. 281.

² 1 Swift, 517, 518; 1 Hill. R. Pr. (4th ed.) 360.

(*a*) Known in the civil law by the term translated *dilapidation*. *Termes de la Ley* — *Waste*, 589.

(*b*) See *Proffit v. Henderson*, 29 Mis. 327. A statute, giving the reversioner or remainder-man an action of *waste* or *trespass*, notwithstanding any intervening estate for life or years, was held not to authorize the bringing either action at the discretion of the plaintiff, but only to give

the one action or the other, in cases, respectively, where it was the appropriate remedy; that is, waste against a tenant, and trespass against a stranger. *Livingston v. Haywood*, 11 Johns. 429.

(*c*) For a full statement of the statutory provisions, see *Hilliard on Real Property*, chap. 18. See, also, *Greene v. Cole*, 2 Saund. 252, n.

ing one species of land into another; he becomes liable, in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed.”¹

§ 3. A prominent species of waste is *the felling of timber*. It is said, that it is scarcely possible to estimate the injury, which the destruction of a few valuable timber trees, by a tenant for life, on a farm with a scanty stock of wood and timber, may occasion to the owner of the inheritance. Hence bills to restrain waste of this character are not to be frowned upon by the court.²

§ 4. In case of *lease*, creating the technical relation of landlord and tenant, express provision is not ordinarily made with reference to the timber; and it is to this class of cases that the general doctrines of waste are applicable. If, however, as is sometimes done, the timber is expressly included in a lease, the lessee may have an action of trespass against the lessor for felling the trees, and the lessor an action of waste against the lessee. And against a stranger each may have his own appropriate action. If the trees are expressly excepted, the lessor may fell them, or sue the lessee for doing it, or maintain trespass against a stranger.³ And it is to be further remarked, that, if a lease for life contains the clause, well known to the ancient law, “*absque impetitione vasti*”—*without impeachment of waste*; such clause both authorizes the tenant to cut timber, without incurring the statutory penalty, and vests the property of it in him, when cut or blown down. But if the timber is cut by a stranger, it belongs to the reversioner.⁴ But such clause does not justify *malicious* waste, destructive of the estate; such as tearing off fixtures, or cutting timber which serves for shelter or ornament of a mansion. Such injuries are sometimes termed *equitable waste*.⁵ (a)

§ 5. In the absence of any express agreement or provision on

¹ 4 Kent, 75.

² *Salles v. Salles*, 3 Sandf. 601. See *Porch v. Frees*, 3 Green, 204.

³ 11 Rep. 48 a; *Pomfret v. Ricroft*, 1 Saund. 322, n. 5.

⁴ 4 Kent, 77; *Co. Lit.* 220 a; *Bowles's*

case, Rep. xi. 79, b. See *Bringloe v. Goodson*, 8 Scott, 71; *Creagh v. Blood*, 8 Ir. Eq. 688.

⁵ *Vane v. Ld. Barnard*, 2 Vern. 738; *Downshire (Marquis of) v. Lady Sandys*, 6 Ves. Jr. 108.

(a) Although only an *immediate* reversioner in fee can sue for waste, yet the property in timber cut by a tenant vests in the remote reversioner. *Moore v. Wait*, 3 Wend. 104; *Bewick v. Whitfield*, 3 P. Wms. 267; *Uvedall v. Uvedall*, 2 Rolle, Abr. 119.

So where the timber is severed by a

storm. *Newcastle v. Vane*, 2 P. Wms. 241.

It is said, *windfalls* belong to the landlord. *Bouv. L. D. Waste*.

In Pennsylvania, a tenant for life of timber-land, who takes timber off, will not forfeit his estate for waste. *Willard v. Willard*, 56 Penn. 119.

the subject, a tenant has no right to cut down timber trees, especially if it is bad husbandry to do so, and there is no pretence of its being done for *estovers*. But he may cut *coppices* and underwoods, according to custom and at seasonable times. So the *thinnings* of fir-trees less than twenty years old belong to a tenant for life.¹ *Timber* trees are those used for building, and the question is one of *local usage*. But it is also waste to cut those standing in defence of a house, though not timber; or to cut trees for fuel, where there is sufficient dead wood; or to *lop* timber trees, and thereby cause them to decay; or to cut down fruit-trees in an orchard or garden.²

§ 6. With reference more particularly to the felling of timber, and in consideration of the important distinction, that in England "every part of every tree will bring cash," while in this country lands are in a great measure valueless until cleared,³ the rules of the English law of waste have been much modified in the United States. It is held in Georgia that the inquiry should be, did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed?⁴ So it is said in New York, the doctrine of waste, as understood in England, is not applicable to a new and unsettled country. Hence, where the whole of a farm, when leased for a rent, is in a wild and uncultivated state, with the exception of a few acres, the parties will be held to have intended, that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation. But not to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value. And to what extent wood may lawfully be cut, must be left to the sound discretion of the jury, under the direction of the court. But where a tenant cuts trees, not for the purpose of preparing the land for cultivation, but for the profit to be derived from a sale, he is guilty of waste. So, although a tenant for years may, from the commencement of his term, gradually clear up the woodland and prepare it for cultivation; yet he will not be permitted, just before the expiration of his lease, to cut

¹ Co. Lit. 53 a; Pidgeley v. Rawling, 2 Coll. 275; Edge v. Pemberton, 12 M. & W. 187.

² Cumberland's (Countess of) case, Moore, 812; Chandos (Duke of) v. Talbot, 2 P. Wms. 606; Rex v. Inhabitants, &c., 3 Burr. 1308; Jackson v. Brownson, 7 Johns. 234; Dyer, 65 a; Co. Lit. 53 a.

³ Givens v. M'Calmont, 4 Watts, 463.

See M'Cay v. Wait, 51 Barb. 225.

⁴ Woodward v. Gates, 38 Geo. 205.

down timber, upon that pretext. And relief is granted, in such case, upon the same principles on which an injunction is granted to stay what is called *equitable waste*.¹ In the same State, it is held that chancery will not restrain a *purchaser* from cutting timber upon the land; unless he does so to such an extent, as to render the land an inadequate security for the unpaid purchase-money.² So, in North Carolina, a widow, to whom were assigned in dower 240 acres of land, only thirty of which were cleared, may cut down the timber on sixteen acres more, intending to clear it for the support of her family.³ But, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would do, and sell the timber that grew on that part of the land; yet it is waste to cut down valuable trees for sale.⁴ So, in Massachusetts, it has been held not to be waste to cut oaks for fuel, on account of their abundance, and the custom of using them for this purpose.⁵ So, in New Hampshire, if a tenant for life of a farm have other outlying woodland, he may take all his necessary fuel from the farm, though, when he formerly owned the farm in fee-simple, he was in the habit of taking part of his fuel from the outlying woodland. And, if the owner of a farm sell it in fee, and take back a conveyance for his life, his former practice in the manner of taking wood for fuel is not competent evidence, on the question whether he has committed waste in cutting wood and timber.⁶ So, in Ohio, timber cut to improve land belongs to the tenant for life, and not to the reversioner.⁷

§ 7. With regard to the amount of damages for the cutting of timber, it is held, that, in an account decreed against a tenant for waste of timber, he may be allowed, in mitigation, for fire-wood and timber furnished by him for the farm, from other premises.⁸

§ 8. Where, in an action on the case in the nature of waste, it was found that the land in question was damaged by cutting and carrying away forest trees, which were of the value of \$253.50; it was held, that this constituted a sufficient injury to sustain such action, but that the plaintiffs should recover only to the extent of the damage to their specific estate.⁹

§ 9. Although cutting and selling wood off the farm is waste,

¹ Kidd v. Dennison, 6 Barb. 9.

² Van Wyck v. Alliger, 6 Barb. 507.

³ Lambeth v. Warner, 2 Jones, Eq. 165. 180.

⁴ Davis v. Gilliam, 5 Ired. Eq. 308.

⁵ Padelford v. Padelford, 7 Pick. 152.

See Sackett v. Sackett, 8 Pick. 309.

⁶ Webster v. Webster, 33 N. H. 18.

⁷ Crockett v. Crockett, 2 Ohio (N. S.),

⁸ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁹ Hamden v. Rice, 24 Conn. 350.

the reversioner cannot claim a forfeiture on this account, if he has assented to it either before or after the cutting.¹

§ 10. It is waste to dig for clay, gravel, lime, stone, &c., except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or clay-pit; but not to work one already opened, or to open new pits or shafts for working the old veins; because they could not otherwise be wrought.² If mines are expressly included in the lease, and there are open ones, those only are embraced. But if there are no open ones, those unopened will pass.³

§ 11. Anciently, the *conversion of one kind of land into another* was waste, because it changed the course of husbandry, and tended to obscure the title. And there was held to be an implied covenant by a lessee, to use a farm in a husband-like manner, and not to exhaust the soil by neglectful or improper tillage.⁴ But the old rule, in the improved state of modern agriculture, may be considered as greatly relaxed, if not wholly obsolete; unless the change in question is contrary to the ordinary course of good husbandry, or is inconsistent with common prudence, or impoverishes the land. And the tenant will not be liable for an injurious change arising from any operation upon the land, which could not reasonably have been foreseen, especially if the reversioner has long delayed to make any claim therefor, and in the mean time the land has been restored to a state as good as the former one.⁵

§ 12. The removal of coarse bog-grass from a farm, which had usually been foddered on the farm, was held to be waste. So the impoverishment of fields, by constant tilling from year to year.⁶ Or suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence. But not converting meadow-land into pasture land; unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry.⁷ Nor meadow or pasture into plough land, or woodland into a farm.⁸ Nor for a tenant for life of a farm, to sell hay, to be removed from the farm, conformably to the custom in the vicinity.⁹

¹ *Clemence v. Steere*, 1 R. I. 272.

² See *Irwin v. Covode*, 24 Penn. 162; *Lynn's, &c.*, 31 Penn. 44; *Kier v. Peterson*, 41 Penn. 361. (The last case raising some novel and curious questions concerning *petroleum*.) See also *Huntley v. Russell*, 13 Q. B. 591.

³ 1 Hill. R. Pr. (4th ed.) 366.

⁴ 5 T. R. 373.

⁵ 1 Swift, 517, 518; *Keepers, &c. v. Al-*

derton, 2 B. & P. 86; *Pyncheon v. Stearns*, 11 Met. 304; *Gunning v. Gunning*, 2 Show. 8; *Jackson v. Andrew*, 18 Johns. 431; Co. Lit. 53 b.

⁶ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

⁷ *Clemence v. Steere*, 1 R. I. 272.

⁸ *Crockett v. Crockett*, 2 Ohio, N. S. 180.

⁹ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

§ 13. In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot.¹ (a) And, as in case of land, waste may be committed by an unauthorized *change* in a building. Thus it is waste to convert a dwelling into a store or warehouse, or a parlor into a stable. Or to convert two chambers into one, or one into two; or a hand-mill into a horse-mill.² Or to pull down a house, though a new one be built, if smaller than the former.³ Or even to build a house where there was none before.⁴ Or take it down after it is built.⁵ But not to erect a new out-house, with timber from the farm, in place of one which had become ruinous.⁶ And a covenant by the lessor, that the lessee may "repair, alter, and improve," will prevent alterations in a building from constituting waste, which might otherwise be so construed.⁷ And, for an unauthorized removal of fixtures, put in by a lessee under a special agreement in writing as to his right to remove, and the lessor's right to purchase them; the lessor's remedy is by action on the agreement, and not on the covenant against waste in the lease.⁸ But the question of *injury* arising from the alteration of a building is to be left to the jury. Thus an action on the case was brought by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found, that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it. The judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case. Held, that the plaintiff was not, at all events, entitled to a verdict; but, as his reversionary interest might be injured, although the house itself was not, and that question had not been submitted to the jury, the court ordered a new trial.⁹

§ 14. As has been already remarked, waste may be either *voluntary* or *permissive*. And permissive waste consists chiefly in suffering buildings to decay. But if they were ruinous when leased, the tenant is not bound to repair, though justified in cut-

¹ Co. Lit. 53 a and n. 3.

² Douglass v. Wiggins, 1 Johns. Ch. 435; Co. Lit. 53 a, n. 3; 2 Rolle, Abr. 814, 815.

³ Bro. Abr. Waste, 93; Co. Lit. 53 a, and n. 4. See Huntley v. Russell, 13 Q. B. 588.

⁴ Co. Lit. 53 a.

⁵ Com. Dig. Waste, D. 2.

⁶ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁷ Hasty v. Wheeler, 3 Fairf. 436, 437.

⁸ Wall v. Hinda, 4 Gray, 256. See vol. i. p. 32.

⁹ Young v. Spencer, 10 B. & C. 145.

(a) To remove *fixtures* unlawfully is waste. (See chap. 17.)

ting timber for that purpose.¹ Or even in cutting timber trees, and selling them to procure boards for repairs, if this course be economical and beneficial to the estate.² And it is not waste merely to violate a covenant to repair.³

§ 15. A tenant is not generally liable for waste caused by act of God or enemies; as where a house falls by reason of a tempest. But if merely unroofed, he is bound to re-cover it before the timbers rot.⁴ And where a lessee for years covenanted, that the buildings which he should erect should, at the expiration of the term, revert to the lessor "without damages of any kind except the natural wear of the same," and a building so erected was destroyed by means of the negligent acts of a third party; held, it was a waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee, in an action against the party guilty of the negligence, was entitled to recover the whole value of such building.⁵ (a)

§ 16. It is held that a court of equity will not interfere, to make a tenant for life liable in respect of permissive waste.⁶ And that an action on the case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair.⁷

§ 17. It will be seen that the law provides various remedies for the injury of waste.⁸ With reference to the parties to such remedies, the *action of waste*, which is the ancient process, lies against a tenant for life or for years, in favor of him only who has the next immediate estate of inheritance, in reversion or remainder.⁹ But a person having an expectant interest in land, less than the inheritance, cannot maintain an action for waste.¹⁰ Nor can one having a contingent remainder, or entitled upon a contingency to an executory devise, as having the next immediate estate of inheritance, maintain an action of waste.¹¹

§ 18. Where the husband has possession of the wife's land, after issue born, case in the nature of waste is held the proper remedy for an injury to the inheritance, by cutting timber trees, and should be in the name of the husband and wife jointly. For an injury to the crop, he must sue alone.¹²

¹ Co. Lit. 53 a, 54 b.

² Loomis v. Wilbur, 5 Mas. 13.

³ Co. Lit. 54 b, n. 1.

⁴ 1 Hill. R. Pr. 266.

⁵ Cook v. The Champlain, &c., 1 Denio, 91.

⁶ Powys v. Blagrove, 27 Eng. L. & Eq. 568.

⁷ Herne v. Bembow, 4 Taunt. 764. See Moore v. Townshend, 4 Vroom, 284.

⁸ See Parrott v. Barney, Deady, 404.

⁹ 2 Greenl. Ev. § 652.

¹⁰ Peterson v. Clark, 15 Johns. 205.

¹¹ Hunt v. Hunt, 37 Me. 333.

¹² Williams v. Lanier, Busb. Law, 30. See Deans v. Jones, 6 Jones, 230.

(a) As to loss by fire, see Filliter v. Phippard, 11 Q. B. 347; Althorff v. Wolfe, 22 N. Y. 366; Lansing v. Stone, 37 Barb. 15.

§ 19. By two early English statutes, any tenants for life or for years are made liable for waste. Statute of Marlbridge, 52 Hen. III. c. 24, authorized the action of waste and gave full damages; and the statute of Gloucester, 6 Edw. I. c. 5, extended the penalty to a forfeiture of the place wasted, and treble damages.¹ But by a late statute, 3 & 4 Wm. IV. c. 27, the writ of waste is abolished. And with regard to the parties who may maintain an action, or be held liable, for waste, the statutes of the different States have made very diverse provisions, greatly modifying the English law.² (a)

§ 20. *Tenancy for life*, to which, as well as tenancy for years, the law of waste applies, is more frequently created by *act of law* than by *act of parties*. But it has been held, that an act, restricting tenants for life from committing waste, embraces tenancies for life created by will.³ (b)

§ 21. A tenant in *dower* is ordinarily liable for the commission of waste. (c) But after a tenant in dower has *assigned* her estate,

¹ 3 Bl. Com. 14.

³ Hamden v. Rice, 24 Conn. 350.

² See 1 Hill. R. Pr. (4th ed.) 869.

(a) No exception lies to a refusal to permit a declaration in waste to be amended so as to make the action for damages and not for forfeiture. Wolcott v. Buck, 97 Mass. 86.

(b) Improvements made by a life tenant will not excuse or justify waste when they will be a benefit to him only, and may be used up and gone before the expiration of the tenancy. Van Syckel v. Emery, 3 Green, 387.

Injunction will be granted in favor of a remainder-man, against a tenant for life or his grantee, to stay the waste being perpetrated in the destruction of growing timber and in clearing up woodlands to put them in cultivation. Dickinson v. Jones, 36 Ga. 97.

(c) In Georgia, the remedy is by an action on the case in the nature of waste, for actual damages, or by injunction. The statute of Gloucester, by which the tenant in dower, in case of waste, forfeited her estate, and was liable for treble damages, has not been adopted. Parker v. Chamblis, 12 Geo. 235.

The language of the statutes referred to is as follows:—

The former provides—“Also fermors, during their terms, shall not make waste, sale nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special licence had by writing of covenant,

making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciamment grievously.”

The latter—“A man shall have a writ of waste in the chancery against him that holdeth by law of England or otherwise, for term of life or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.”

It has been a matter of very serious discussion, whether the latter statute applies to permissive waste. 1 Chit. Gen. Prac. 386; 1 Saund. 323 b, n. 7 and n. k.; 2 Ib. 269, n. 11 and n. b.

It is a sufficient compliance with Vt. Gen. Sts. c. 55, § 13, prohibiting waste by the tenant in dower, if she conducts in relation to the buildings, fences, and lands, as a prudent man would with his own absolutely. She may defer repairs till a decline in the price of materials and labor, provided the estate suffers no immediate and permanent injury thereby. To the fact, that she permitted a little more hay and muck to be removed than was replaced by manure returned, the maxim *de minimis, &c.*, applies. Harvey v. Harvey, 41 Vt. 373.

she is not liable to the assignee of the reversion for waste committed by her assignee, either in an action of waste, or in an action on the case in the nature of waste.¹

§ 22. In general, a tenant *by the curtesy* is liable for waste.² So *husband and wife* may be jointly liable.³ The husband of a tenant in dower, who removes a house from the premises, is liable in an action in the nature of waste, even after the death of his wife, though he may have built the house himself. But the husband of a tenant in dower is not liable for permissive waste, after the death of his wife, and the surrender of his possession.⁴

§ 23. A husband, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They began cutting during her life, and continued cutting after her death. On a bill filed by her infant heir, the cutting was enjoined; and it was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question of the husband's accounting for it; and also whether the interests of the infant required that the trees still standing should be felled.⁵

§ 24. Although liability for waste is usually connected with *tenancy*, it is held that a tenant is responsible for waste, by whomsoever done. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrong-doer. The tenant, in this respect, is compared to a *common carrier*.⁶ But in equity a tenant may be joined as defendant with the party by whom the waste was actually committed. And, in a suit for waste against a tenant for life and her undertenant, on a decree for an account against both, the master may be ordered to ascertain what portion of the sum reported against the former shall be paid by the latter.⁷

§ 25. *Ecclesiastical persons*, — bishops, parsons, &c., — seised of lands *jure ecclesiæ*, though having a fee-simple qualified, are placed, in respect to waste, under the restrictions of tenants for life.⁸ But they may cut timber or dig stone for repairs of the church or parsonage.⁹ (See § 29.)

§ 26. An action on the case, in the nature of waste, lies against

¹ Foot v. Dickinson, 2 Met. 611.

² Morgan v. Larned, 10 Met. 50; Davis v. Gilliam, 5 Ired. Eq. 308.

³ Bacon v. Smith, 1 Ad. & Ell. N. S. 345; Dejarnatte v. Allen, 5 Gratt. 499.

⁴ Dozier v. Gregory, 1 Jones, 100.

⁵ Ware v. Ware, 2 Halst. Ch. 117.

⁶ 4 Kent, 77; 1 Cruise, 124; White v. Wagner, 4 Har. & J. 373.

⁷ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁸ Liford's case, 11 Rep. 49 a.

⁹ Ibid.; Marlborough (Duke of) v. St. John, 10 Eng. L. & Eq. 146.

the assignee of a lessee.¹ But an action of waste does not lie by the heir against the assignee of tenant by the curtesy, but only against the tenant himself.² So an action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted from time to time, and at all times during the term when need should require, sufficiently to repair the premises, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of J. M.; upon a breach, that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up, in much worse order and condition than when the same were finished under the direction of J. M.³

§ 27. A *guardian* has in some cases been held liable for waste. But where a testator appoints a trustee of all his estate, during the infancy of his heir, such trustee is neither a guardian, so as to be liable for waste at common law, nor a tenant for life, or years, or other term, so as to be within the statutes against waste.⁴

§ 28. It has been held that one *tenant in common* may be liable to another for waste. The subject, however, is often regulated by statute. And it is held, that the action on the case in the nature of waste, allowed by the Revised Statutes of North Carolina, to one tenant in common against his cotenant, is confined to cases where there is a permanent injury done to the property held in common.⁵

§ 29. A perpetual *curate* is liable to an action on the case, at the suit of his successor, for dilapidations.⁶ But case, as for dilapidations, does not lie against the executors of a prior incumbent for miscultivation of the glebe.⁷ (See § 25.)

§ 30. As has been suggested, the law of waste has been greatly modified in the United States, as well with reference to *remedies*, as to the injury itself. It is said⁸ that, although the provisions of the statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing and applicable to our local circumstances; yet the action of *estrepement*, or waste, is in great degree superseded by

¹ Short v. Wilson, 13 Johns. 33.

² Bates v. Shraeder, Ib. 260.

³ Jones v. Hill, 7 Taunt. 392.

⁴ Kincaird v. Scott, 12 Johns. 368.

⁵ Smith v. Sharpe, Busb. Law, 91.

⁶ Mason v. Lambert, 12 Ad. & Ell. N. S. 795.

⁷ Bird v. Relfe, 1 Nev. & Man. 415.

⁸ 4 Kent, 80, 81.

an action on the case in the nature of waste, which lies in favor of any other reversioner, as well as the owner in fee.¹ (a) And in New York (b) it is held, that, if a lessee cut trees which it is his duty, either by law or by his contract with the lessor, to preserve, he is liable to an action of waste, or case in the nature of waste; or, in the case of a contract, to an action on the contract. He is also liable in trover for the wood which has been severed from the freehold. Or in trespass, for carrying away and converting the wood, after the trees had been cut. Therefore, where a lessee for years, by a clause in the lease not amounting to an exception, agreed to leave and not to cut certain trees, which, however, he did cut and carry away during the term; held, though trespass *qu. claus.* could not be brought for the cutting of the trees, because the plaintiff was not in possession, yet the landlord might maintain trespass *de bonis asportatis* against the tenant, for carrying away the wood after it had been severed from the freehold.²

§ 31. Case, in the nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant for the breach of covenants contained in his lease.³ (See i. 28.) But an action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair.⁴

§ 32. If a tenant at will commits waste, it is held a determination of the will, and trespass *qu. claus.* may be maintained against him by the reversioner.⁵ (c)

¹ 4 Kent, 81. See 1 Hill. R. Pr. (4th ed.) 375; McCay v. Wait, 51 Barb. 225.

² Schermerhorn v. Buell, 4 Denio, 422.

³ Kinlyside v. Thornton, 2 W. Black. 1111.

⁴ Jones v. Hill, 1 Moore, 100.

⁵ Daniels v. Pond, 21 Pick. 367. See Ruckman v. Atwater, 4 Dutch. 581.

(a) In California, the remedy is confined to treble damages. Chipman v. Emeric, 3 Cal. 273.

An action on the case will lie, though the plaintiff purchased the estate of the particular tenant after the waste was committed. The purchase does not imply nor tend to show, that the claim for damages was thereby settled. Dupree v. Dupree, 4 Jones, 387.

Prior to the Geo. Code, Jan. 1, 1863, there was no forfeiture of the life-estate by the commission of waste. Woodward v. Gates, 38 Ga. 205.

(b) By the code, §§ 450-452, the action of waste is abolished, and the remedies are judgment for damages, and forfeiture,

when the injury equals the value of the tenant's estate or unexpired term. And the relative value of the land, with wood on or off, the depreciation of the wood if left standing, and the amount of woodland left on the farm, become material in determining the amount of damage. Harder v. Harder, 26 Barb. 409.

(c) In an action for use and occupation, under an agreement that the defendant should hold as tenant at sufferance, and should keep the fences, buildings, and improvements in good repair; an allegation, that he had cut large amounts of wood and timber on the premises, is insufficient to admit evidence of waste, as it would not be waste to cut wood for his

§ 33. Although, as has been stated, waste is a wrong, which, even according to the terms of its legal definition, is committed by a *tenant* against the *landlord*, *reversioner*, or *owner of the inheritance*; yet a similar wrong, subject to like remedies, may sometimes be committed by and against other parties. Thus, somewhat upon this principle, where a purchaser of mills, being in possession, negligently suffers them to be burned, he is responsible to his vendor for the loss, upon a rescission of the contract, deducting the amount paid by him.¹ So an injunction was allowed, restraining waste on a farm conveyed by the complainant to the defendant, on a bill, alleging that a deed for the farm was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance; and praying that the deed may be declared void. And, after answer, the motion was retained to the hearing.²

§ 34. So the injury of waste may be committed by a party in the *adverse possession* of land, more especially where a suit has been brought by the alleged true owner to eject him. And in some of the States express statutory provision has been made in reference to this kind of waste. Though it is held, that a person in possession of land under such circumstances should, until he is legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be were no adverse claim set up; subject to the restriction, that he shall not commit a permanent and lasting injury to the inheritance.³ (a) So in New York, it is held that the purchaser of land *sold on execution*, after receiving the sheriff's deed, may bring waste, or an action on the case in the nature of waste, against the defendant in the execution, for cutting timber while he remained in possession, during the fifteen months subsequent to the sale. He may also bring trover for the timber. But not replevin in the *cepit*, which lies only where trespass might be brought; and trespass for an injury to real estate can only be sustained by a party in possession.⁴ But a creditor, to whom the life-interest of his debtor in land has

¹ *Cornish v. Strutton*, 8 B. Monr. 586.

² *Staats v. Freeman*, 2 Halst. Ch. 490.

³ *People v. Davison*, 4 Barb. 109.

⁴ *Rich v. Baker*, 3 Denio, 79. See *Thomas v. Crofut*, 14 N. Y. 474.

own use, or timber to make the stipulated repairs. *Wright v. Roberts*, 22 Wis. 161.

(a) A court of equity, upon affidavit that the complainant in a bill praying an injunction against a writ of possession in

ejectment, is committing waste, will, at the instance of the defendant, make an order in the cause, staying the waste. *Howze v. Green*, Phill. (N. C.) Eq. 250.

been set off on execution, cannot, in an action of trespass against such debtor, for entering and cutting trees on the land, recover damages for trees belonging to the inheritance, the cutting of which by the creditor would be waste.¹

§ 35. Waste is a prominent subject of chancery jurisdiction. It is said, chancery will interpose where a trespasser, in collusion with the tenant, attempts to cut timber; or where boundaries are in dispute, and one party is about to cut ornamental or timber trees; or where one in possession under a contract is proceeding to cut timber. So where a mere trespasser digs into a mine and works it. Or where lessees are taking from a manor, bordering on the sea, stones of peculiar value.²

§ 36. Although, as has been seen, only the immediate reversioner in fee can maintain the action of waste, chancery will interpose to prevent waste, upon application of the owner in fee, notwithstanding an intermediate reversion. Or, in favor of the landlord, against a sub-tenant.³

§ 37. In case of *privity of title*, an injunction will be granted without showing *irreparable injury*.⁴ Though it is otherwise as between parties *claiming adversely*.⁵ And a landlord need not prove his title.⁶ (a) So there may be a decree of account for past waste.⁷ Or to remove a cloud on the title.⁸

¹ McKen v. Gammon, 33 Me. 187.

² 2 Story, Eq. 244, 245, § 929; M'Cay v. Wait, 51 Barb. 225.

³ 1 Hill. R. Pr. 375. See Denny v. Brunson, 29 Penn. 382; Dennett v. Dennett, 43 N. H. 499.

⁴ George's Creek, &c. v. Detmold, 1

Md. Ch. 371; Hamilton v. Ely, 4 Gill, 34. But see Lyon v. Hunt, 11 Ala. 295.

⁵ Ibid.

⁶ Parker v. Raymond, 14 Mis. 535.

⁷ Rodgers v. Rodgers, 11 Barb. 595.

⁸ Lyon v. Hunt, 11 Ala. 295.

(a) In a bill for waste, proof of a single clear instance of waste, committed intentionally, is sufficient to entitle the plaintiff to a continuance of the injunction and to a decree for an account. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

An account may be ordered, of waste committed by a tenant for life, and her under-tenant, in respect of timber, dilapidations, undue tillage, and withdrawing manure. Ibid.

Equity will interfere to prevent injury to land, even where the title is in dispute, and the right doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant or otherwise, the plaintiff cannot obtain relief at law. *Spear v. Cutter*, 5 Barb. 486.

But not to prevent the removal of tim-

ber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy at law for such injury. Ibid.

But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the court, to avoid a multiplicity of suits, will allow an account and satisfaction for what has been done; and, where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber he has cut. Ibid.

Persons who have removed timber from lands can be compelled to account for that taken, and can be enjoined from removing the part on the lands. *Porch v. Frees*, 3 Green (N. J.), 204.

§ 38. It has been held, that an injunction will not be granted upon the allegation that the defendant is selling timber of the complainant, without an allegation of peculiar value for some special purpose.¹ But the mere expression of a right and intention to commit waste, without any act, will be sufficient ground for an injunction, if occurring *pendente lite*.²

¹ *Hatcher v. Hampton*, 7 Geo. 49.

19 Eng. L. & Eq. 610; *Green v. Keen*, 4

² 1 Hill. R. Pr. 377. See *Ex parte* Md. 98; *The White, &c. v. Comegys*, 2
Haynes, 18 Wend. 611; *Anwyl v. Owens*, Cart. 469.

CHAPTER XXVIII.

INJURIES TO RELATIVE RIGHTS. — PUBLIC RELATIONS. — OFFICERS OF THE LAW. — JUDICIAL OFFICERS.

- | | |
|---|---------------------------|
| 1. Injuries to <i>relative rights</i> ; by and against officers of the law; judicial officers. | 11. Want of jurisdiction. |
| 4. Magistrates and Justices of the Peace; <i>judicial</i> and <i>ministerial</i> duties and acts. | 12. Malice, &c. |

§ 1. HAVING considered torts to *absolute* rights of persons, reputation, and property, we proceed to a view of those committed by or against parties, as *related* to others in some public or private capacity. This class of wrongs has been often incidentally referred to in the foregoing pages, but it now requires a distinct and detailed consideration.

§ 2. Among wrongs of a *public* nature (using the word *public* in the sense above explained), are chiefly those committed by or against *officers of the law*, assuming to act under color and protection of their office.

§ 3. A general and comprehensive division of officers of the law is that of *judicial* and *ministerial* officers. Judicial officers are defined as those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law; and ministerial officers, as those whose duty it is to execute the mandates, lawfully issued, of their superiors.¹ (a) With regard to the

¹ 2 Bouv. L. D. 260. See *Home v. Mason*, 14 Iowa, 501.

(a) "Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises, within the limits of his jurisdiction, a judicial authority." Per Bigelow, J., *Ela v. Smith*, 5 Gray, 186.

When a duty of a judicial nature is imposed upon a public body, they are exempt from responsibility by civil action for the manner in which the duty is performed. But where a duty purely ministerial is violated, or negligently performed by a public body or officer, an injured party may have redress by action. *Kavanagh v. Brooklyn*, 38 Barb. 232; 46 Me. 127.

The laying out of a way by county

commissioners is a judicial act, but the construction of it, and the building of a bridge, which forms part thereof, is a ministerial duty, for negligence in the performance of which the city, or individuals undertaking its performance, will be held liable. *Stone v. Augusta*, 46 Me. 127.

Ministerial duties of a public officer may be discharged *by deputy*; judicial duties cannot. *Abrams v. Ervin*, 9 Iowa, 87.

The exemption of judicial officers has been held applicable to the liability of the warden of a prison suffering a convict to go at large. *Scheettgen v. Wilson*, 48 Mis. 253.

So also to a town board of equaliza-

former, it is said by an ancient authority, that the law has so much respect for the certainty of judgments and authority of judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact.¹ And it is further said to be a general rule of very great antiquity, that "no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions. In the imperfection of human nature, it is better that an individual should occasionally suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct; for these I trust there is, and always will be, some due course of punishment by public prosecution."² (a) And the following extended remarks of a learned chief justice of Massachusetts may well be cited, as giving a recent and comprehensive view of the whole subject: "It is a principle lying at the foundation of all well-ordered jurisprudence, that every judge, whether of a higher or a lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiassed convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought

¹ Bac. Max. 17; *Bevard v. Hoffman*, 18 Md. 479. See *Pike v. Megoun*, 44 Mis. 491; *Taaffe v. Downes*, 3 Moo. P. C. C. 36, n.; *Ryalls v. Reg.*, 11 Q. B. 795.

² *Garnett v. Ferrand*, 6 B. & C. 611; 1 Cowp. 172.

tion, determining the value of land, even though acting illegally, maliciously, or corruptly. *Steele v. Dunham*, 26 Wis. 393.

So to a selling broker deciding as to the quality of goods sold. *Pappa v. Rosa*, L. R. 7 C. P. 32.

So to assessors of taxes. *Bank v. N. Y.*, 43 N. Y. 184.

(a) The same protection or privilege is thus still more extensively described: "An action cannot be supported against a judge, nor a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive, nor against a juryman, nor the attorney-general, nor a superior naval or military officer, for any act within the scope of his authority." 1 Chit. Pl. 68.

The rule has been applied to a board of pilot commissioners. *Downer v. Lent*, 6 Cal. 94.

Judges of election hold a judicial office, and if, in the honest exercise of judgment, they reject the vote of a legal voter, he can hold them to no liability for damages or otherwise. *Bevard v. Hoffman*, 18 Md. 479; *Miller v. Rucker*, 1 Bush, 135. See vol. i. p. 78; chap. 82, § 3.

Where it was charged that a judge connived at waste by an administrator; held, if his orders were complained of, they might be corrected by appeal or *certiorari*; if the charges related to matters not involved in his official conduct, the remedy was by suit against him personally. *Glavecke v. Tijirina*, 24 Tex. 663.

to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right, in matter either of law or fact; but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale. Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear; to property, reputation, and liberty, civil and social; to political and religious privileges; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. If it be said, that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction, — the conclusion of his own mind, in the decision of the original case, — as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations. The general principle, which excepts judges from answering in a private action, as for a tort, for any judgment, given in the due course of the administration of justice, seems to be too well settled to require discussion; and, as was said by Mr. Chief Justice Kent, in the case of *Yates v. Lansing*, (a) ‘has a deep root in the common

(a) In this leading and important case, the chancellor of New York having committed one of the officers in chancery for malpractice and contempt, a judge of the Supreme Court, on *habeas corpus*, discharged him; and he was afterwards re-

law.' I shall, therefore, only refer to the case just mentioned, as reported in 5 Johns. 282, and 9 Johns. 395, where the authorities

committed by the chancellor for the same cause. Held, the chancellor was not liable to the penalty provided in the *habeas corpus* act: "No person set at large on *habeas corpus* shall be again imprisoned for the same offence, unless by the legal order or process of the court having jurisdiction of the cause."

The following elaborate and learned opinion, which was afterwards affirmed by the Court of Appeals, was given by Chief Justice Kent:—

"The record before the court presents the case of a civil suit, brought against the chancellor of this State, for an act done by him in his judicial capacity, while sitting in the Court of Chancery. The pleadings admit that the defendant did, as chancellor, and not otherwise, at a court of chancery, held on the 15th of September, 1808, order the plaintiff, after he had been discharged upon *habeas corpus*, by one of the judges of this court, to be recommitted for the contempt and malpractice for which he had been originally imprisoned, and that the action is brought for such reimprisonment, and to recover the penalty mentioned in the 5th section of the *habeas corpus* act.

"The counsel who appeared for the plaintiff at the last term (and who was the same counsel that argued the case upon the *habeas corpus* at the last February term), declined to argue this case, but would not consent that judgment should pass against the plaintiff by default, and pressed the court for a decision during the term, and accompanied his motion with an intimation that he intended to carry the cause, by writ of error, into the court for the correction of errors. This fact must be my apology for bestowing more time upon the case than the doctrine which it involves might seem to require. We have given it a deliberate attention, and in the opinion of the court, the action cannot be sustained upon any principle of law, justice, or public policy.

"The words of the statute upon which the suit is brought are, 'that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause; and if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be recommitted or imprisoned, for the same offence, any person so set at large, he shall forfeit to the party grieved, 1250

dollars.' There appear to be several strong reasons why this section in the statute cannot support the action.

"The order of the Court of Chancery was legal, inasmuch as the previous discharge of the plaintiff was not in a case authorized by the statute, and was null and void in law. This was the decision of the court at the last August term, and it will be unnecessary to review that point, or repeat what was then said. According to the judgment of the court, there cannot be a pretext for this suit, even if the defendant was otherwise liable for an undue exercise, or misapplication, of the powers of his court.

"But the point which I purpose now principally to consider is, whether there be any foundation in law for the suit, admitting that the defendant was mistaken in supposing that the discharge of the plaintiff, under the *habeas corpus*, was unduly made. The statute allows the party so discharged to be again imprisoned for the same offence, provided it be by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause. Any court which has jurisdiction of the subject-matter, may reimprison, notwithstanding the discharge. To state a plain case: if a person committed at a court of *oyer and terminer*, or sessions of the peace, of a felony, and imprisoned in the State prison, be discharged by a judge on *habeas corpus*, on the ground that the court had no authority to commit, or that the order of commitment was invalid, would any one doubt that the court might cause the convict to be further reimprisoned either upon the same warrant, if it judged it sufficient, or by awarding a new and better one? The statute never intended such a destruction of principle, as to intrust to a judge in vacation the power to control the judgment, or check the jurisdiction of a court of record. Our system of appellate jurisdiction is built upon a sounder foundation; and instead of intrusting to the *fiat* of a single judge, to correct the errors of any court of justice, it has provided the constitutional process by appeal, or a writ of error. It is sufficient that the court which commits, has jurisdiction of the cause of commitment; and as the cause in the present case was an alleged malpractice and contempt, the Court of Chancery most undoubtedly had jurisdiction over the subject-matter. It is decisive on the point, that the court

are fully stated and reviewed. Although there was some difference of opinion in that case, it was upon the point, whether or

considered the act of which it complained, to be a contempt and malpractice, by being an unauthorized interference with the practice of the court. Every court judges exclusively for itself, of its own contempts; no other court, and much less a single judge out of court, can undertake to judge on the question. The plaintiff was recommitted, to use the language of the order, for 'contempt and malpractice;' and whether the Court of Chancery was right or wrong in considering that the plaintiff's conduct amounted to a contempt, and whether it took the proper steps to ascertain the contempt, is perfectly immaterial as to the point of jurisdiction. It had authority to punish contempts. It must judge what are contempts. Practising as solicitor without leave, and practising in another's name without his knowledge, are all misdemeanors, and contempts of the court. These are undeniable propositions.

"On the ground which the court took, then, it certainly had jurisdiction of the subject-matter. The case of Howell, the recorder of London, is to this purpose. He presided at a court of *oyer and terminer*, and fined and imprisoned a juror, for bringing in a wrong verdict. In a suit against him for this act, the whole Court of C. B. declared that the *oyer and terminer* had jurisdiction of the cause, because it had power to punish a misdemeanor in a juror; though, in the case before the court, the recorder had made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor. (*Hamond v. Howell*, 2 Mod. 218.)

"To be prepared to give a sound construction to the statute giving the penalty in question, we ought to bear in mind the uniform and solemn language of the common law, as to the responsibility of judges, by private suit, for their judicial decisions. 'We shall never know,' says Lord Coke, 'the true reason of the interpretation of the statutes, if we know not what the law was before the making of them.' Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non jndice*, and all concerned in such void proceedings are held to be liable in trespass. (*Case of The Marshalsea*, 10 Co. 68; *Terry v. Huntington*, Hardres, 480.) But I believe this doctrine has never been carried so far as to justify a suit against the mem-

bers of the superior courts of general jurisdiction, for any act done by them in a judicial capacity. There is no such case or decision which I have met with, and I find the doctrine to be decidedly otherwise. In *Miller v. Seare* (2 Black. Rep. 1141), Lord Ch. De Gray said, that the judges of the king's superior courts of general jurisdiction were not liable to answer personally for their errors in judgment. The protection as to them was absolute and universal; with respect to the inferior courts, it was only while they act within their jurisdiction. The penalty sought for in the present suit, was, I think, very clearly imposed upon individuals only, acting ministerially or extra-judicially out of court. The words of the statute do not apply to the act of a court done of record; and we ought to require a positive application of the penalty to such a case, before we can in decency presume that the statute intended so far to humble and degrade the judicial department, as to render the judges responsible in a civil suit for their judicial acts.

"The doctrine which holds a judge exempt from a civil suit or indictment for any act done, or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice. *Juvat accedere fontes atque haurire.*

"Sergeant Hawkins (b. 1, c. 7, p. 6) lays down this general rule, as the result of his inquiries on the subject: 'That the law has freed the judges of all courts of record from all prosecutions whatsoever, except in the Parliament, for any thing done by them openly in such courts as judges. For,' he adds, 'the authority of government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice, and that if they should be exposed to the prosecution of those whose partiality to their own causes would induce them to think themselves injured, it would be impossible for them to keep up in the people that veneration of their persons, and submission to their

not the order passed by the chancellor, which was the subject of complaint, was a judicial act, done within his jurisdiction; not,

judgments, without which it is impossible to execute the laws with vigor and success.

"We meet with the principle here stated as early as the Book of Assise, 27 Ed. III. pl. 18. The case there was, that A was indicted, for that, being a judge of *oyer and terminer*, certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded, if he should answer for falsifying the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void. And at this same early period we find this wise protection extended equally to grand jurors. In 21 Ed. III. Hil. pl. 16, a writ of conspiracy was sued in K. B., and the question was, whether it be a good plea to the action, that the defendants were indictors in the case complained of; and it was held to be a good plea. In 9 Hen. VI. 60, pl. 9, an action upon the case was brought against A for fraud, in executing the office of escheator, and Babington, J., said, and so it was agreed, that such a suit would not lie against a judge of record. So in 9 Ed. IV. 3, pl. 10, it was held, by Littleton, J., and not denied, that an action of assault and battery would not lie against a justice of the peace for what he did as a judge of record; and the principle was afterwards more solemnly advanced by all the judges in 21 Ed. IV. 67, pl. 49. They all concurred in opinion that for what a justice of the peace did *in the sessions*, he was not amenable.

"These cases and many more opinions of the like effect, which could be gleaned from the Year Books, conclusively show, that judges of all courts of record, from the highest to the lowest, and even jurors, who are judges of fact, were always exempted from prosecution, by action or indictment for what they did in their judicial character. It did not escape the discernment of the early sages of the law, that the principle requisite to secure a free, vigorous, and independent administration of justice, applied to render jurors as well as judges inviolable; and I fully acquiesce in the opinion of Lord Ch. J. Wilmot, that trials by jury will be buried in the same grave with the authority of the courts who are to preside over them. But I proceed to show that in subsequent periods of the English law, the doctrine was equally asserted and enforced. Staunford, in his '*Pleas of the Crown*,' which

was first published in 1567, says (p. 173), that no prosecution for conspiracy lies against grand jurors, for it shall not be intended, that what they did by virtue of their oaths, was false and malicious; and that the same law applied to a justice of the peace, for he shall not be punished as a conspirator, for what he does in open sessions as a justice. In the case of Floyd and Barker (12 Co. 23), the subject underwent a solemn consideration by Lord Coke, and all the judges; and their resolution was, that no grand juror was responsible for finding an indictment, and that no judge, who tries, and gives judgment in a criminal case, or does any act in court, was to be questioned for it, either at the suit of the party, or of the king. And it was observed, 'that if the judges of the realm, who have the administration of justice, were to be drawn in question, except it be before the king himself, it would tend to the slander of justice, and those who are the most sincere would not be free from continual calumniations.'

"In *Aire v. Sedgwick* (2 Roll. Rep. 195, 197), Noy, J., laid down the same uncontradicted rule, that no action lay against a judge for any thing which he did as judge. But the case of *Hamond v. Howell* (1 Mod. 184, 2 Mod. 218) deserves our particular notice, as being peculiarly weighty on the point before us. This is the case to which I have already alluded for another purpose. The defendant was recorder of London, and, as one of the judges of *oyer and terminer*, had fined and imprisoned the plaintiff, because he had brought in a verdict, as a petit juror, contrary to the direction of the court and the evidence. If ever a case was calculated to awaken sensibility, and to try the strength of the principle, this must have been one. It arose some time after the decision in *Bushell's case*, in which it was argued by all the judges, that a juror was not finable for his verdict. The act of the defendant was admitted to have been illegal, and no doubt it struck the whole court as a high-handed and arbitrary measure. The counsel for the plaintiff admitted the weight of the objection, that an action would not lie against a judge of record for what he did, *quatenus* a judge; and he endeavored to except this case from the general principle, by contending that what the defendant did was not warranted by his commission, and that, therefore, he did not act as judge. But the court did not yield

whether, if it were within his jurisdiction, he could be called upon to answer for it elsewhere in a civil action. And we think, there-

to such miserable sophistry ; for they held, that the bringing of the action was a greater offence than the imprisonment of the plaintiff, for it was a bold attempt both against the government and justice in general. They said that no authority or semblance of an authority, had been urged for an action against a judge of record, for doing any thing as judge ; that this was never before imagined, and no action would lie against a judge for a wrongful commitment, any more than for an erroneous judgment ; that though the defendant acted erroneously, he acted judicially, and if what he did was corrupt, complaint might be made to the king, and, if erroneous, it might be reversed.

"The case of Groenvelt (or Grenville) *v. Burnwell* (or *Burwell*) (12 Mod. 386, 1 Salk. 396, 1 Ld. Raym. 454) arose long after the passing of the *habeas corpus* act, and the unanimous opinion of the Court of K. B. was given by Sir John Holt, whose name has always been held in reverence by English freemen ; for he was a sound judge and an inflexible patriot, who manifested, on every occasion, a generous and distinguished zeal for the liberties of the people. He went at large into the cases in support of the doctrine, and showed to every one's entire satisfaction, that judges were not liable to an action by the party, for what they did as judges ; that no averment was admissible that a judge of record had acted against his duty ; that even if a justice of the peace should record that, upon his view, as a force which was no force, he could not be drawn in question, for it is a judicial act ; that, in like manner, jurors were not responsible for their verdicts, because they were judges of fact ; and he added in this emphatical language, 'that it would expose the justice of the nation, and no man would execute the office of judge, upon peril of being arraigned, by action or indictment, for every judgment he pronounces.' In the very modern cases of *Miller v. Seare* and others (2 Black. Rep. 1145), and of *Mostyn v. Fabrigas* (1 Cowp. 172), *De Grey, Ch. J.*, in the one, and *Lord Mansfield* in the other, case, explicitly and emphatically declare the same doctrine. Indeed, I am persuaded that the discussion of the question, even under this 5th section of the *habeas corpus* act, would not now be endured in any court in Westminster Hall.

"I shall close this review of the cases with noticing one arising in an American

court. The case I allude to is that of *Pheips v. Sill*, lately decided in the Supreme Court of Connecticut (Day's Cases in Error, 315). From the characters composing that court, I think the decision entitled to great consideration. That was a suit against a judge of probates for omitting to take security from a guardian, and the court held, that the action would not lie. They said that 'it was a settled principle, that a judge is not to be questioned in a civil suit for doing, or for neglecting or refusing to do, a particular official act, in the exercise of judicial power. That a regard to this maxim was essential to the administration of justice. If, by any mistake in the exercise of his office, a judge should injure an individual, hard would be his condition if he were to be responsible for damages. The rules and principles which govern the exercise of judicial power are not, in all cases, obvious ; they are often complex, and appear under different aspects to different persons. No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend.'

"After this recognition of the principle, I may confidently appeal to every sound and intelligent lawyer, whether it could possibly have been the meaning of the *habeas corpus* act, to make the chancellor, or any other judge of any other court of record, responsible in a civil suit, for a heavy penalty, for an action done of record by him, while sitting in his court of justice ? Ought such a sacred principle of the common law, as the one we have been considering, to be subverted, without an express declaration to that effect ? Does such a construction appear ever to have been entertained in any book, or by any individual, from the time of the statute of Charles II. until the bringing of the present suit ? Our act is but a transcript from the English statute, and Sergeant Hawkins (b. 2, c. 15, § 24) expressly excludes every such construction. 'The *habeas corpus* act,' he observes, 'makes the judges liable to an action at the suit of the party, in one case only, viz., in refusing to award a *habeas corpus*, and seems to leave it to their discretion in all other cases, to pursue the directions of the act, in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeit-

fore, that those who dissented in this case concurred with the opinion of the court, and with all the authorities, that where the subject matter and the person are within the jurisdiction of the court, the judge, whether of a superior or inferior court, is justified. These rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity."¹

§ 3 *a*. Upon these grounds, it is held in an old authority, if a judge makes a mistake in any thing within his jurisdiction, an action will not lie against him or his officer. Though it is otherwise, if he award process which he has no jurisdiction to award.²

¹ Per Shaw, Ch. J., *Pratt v. Gardner*, 2 Cush. 68-70.

² *Smith v. Boucher*, Rep. t. Hardwicke (Annaly), 64.

ure.' The penalty to which the chancellor and judges are liable, is mentioned in the fourth section of the act; and that is given against them by name, and only for their refusal, *in the vacation time*, to allow a writ of *habeas corpus*, when duly applied for. The chancellor and judges may refuse such a writ, at their discretion, if applied for in term time, and the penalty will not attach. It is only when they refuse, in a mere ministerial capacity, to allow a writ, that they are made responsible. The allowance of a writ in vacation, is not a judicial act. It is merely analogous to the case stated in *Green v. The Hundred of Buccleuch* (1 Leon. 323), where it was held, that an action on the case lay against a justice of the peace, for refusing to take the oath of the party robbed, because in such case he did not act as a judge, but as a particular minister appointed by the statute of Eliz. to take examinations. The *habeas corpus* act does not, then, in any provisions of it, violate or even touch the principle, that no suit lies for a judicial act. Though the judge is bound under a penalty, to allow the writ, yet when the prisoner is brought before him he is to discharge, bail, or remand him, as he shall be advised; and no action or penalty is given for what he shall then do or refuse to do.

"Judicial exercise of power is imposed upon the courts. They *must* decide and act according to their judgment, and therefore the law will protect them. The chancellor, in the case of the plaintiff, was bound in duty to imprison and reimprison him, if he considered his conduct as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his

court, as he was bound in any other case to exercise his power. He may possibly have erred in judgment, in calling an act a contempt which did not amount to one, and in regarding a discharge as null when it was binding. This court may have erred in the same way; still it was but an error of judgment, for which neither the chancellor, nor the judges of this court, are or can be responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. The penalty is given only for the voluntary and wilful acts of individuals, acting in a private or ministerial capacity. It is a mulct, and given by way of punishment. *The person who forfeits it, must 'knowingly, contrary to the act,'* reimprison, or cause the party to be reimprisoned. There must be the *scienter*, or intentional violation of the statute; and this can never be imputed to the judicial proceedings of a court. It would be an impeachable offence, which can never be averred or shown, but under the process of impeachment.

"No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon every thing sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.

"I am therefore of opinion that judgment ought to be entered for the defendant."

Thus commissioners of bankrupts are held not liable to an action of trespass, for committing a person who does not answer to their satisfaction, when examined before them, touching the estate and effects of a bankrupt; the act being within their authority, though it may be done through an erroneous or mistaken judgment.¹ (a) So if an action be brought against a judge of a court in a foreign country, if under the dominion of the crown, for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a sufficient justification.² So the mayor of a city acts judicially, in calling out a military force to suppress a threatened riot, and, "so long as he acts within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals."³ So where the State constitution confers the right to vote upon "white male citizens" only, and a person offering to vote is challenged on the ground of his color, the inspectors, in determining the question of qualification, act judicially and not ministerially; and therefore they are not liable in an action on the case for damages, for improperly refusing a vote, because the person offering it was partly of African descent.⁴ So an action upon the case was held not to lie against *the vicar-general of the bishop*, for excommunicating the plaintiff with *the greater excommunication*, for contumacy, in not taking upon him administration of an intestate's effects, to whom the plaintiff was next of kin, and intermeddling with the goods, &c.; although the citation, by which the plaintiff was cited, was void, by reason that it required him to appear and take administration, &c., without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, namely, the granting administration, and there was no malice.⁵ So *the steward*

¹ *Doswell v. Impey*, 1 B. & C. 163.

See *Bispham v. Patterson*, 2 M'L. 87.

² *Mostyn v. Fabrigas*, 1 Cowp. 172.

³ Per Bigelow, J., *Ela v. Smith*, 5 Gray, 135, 136.

⁴ *Gordon v. Farrar*, 2 Doug. (Mich.)

411.

⁵ *Ackerley v. Parkinson*, 3 M. & S.

411.

(a) But where a warrant of commitment by the court of review, made in the matter of E., a bankrupt, after reciting that, by an order of the same court therein, on the petition of E., it was ordered that W. G. should stand committed to the Fleet, for his contempt in the said petition mentioned, and that a warrant should issue for that purpose; required the warden of the Fleet to take W. G. and convey him to the Fleet, there to remain until the further order of the court;

and the previous order stated a petition to have been preferred by E., that W. G. might stand committed "for his contempt of the order in the said petition mentioned," but specified nothing further as to the contempt: held, that the warrant and order were bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself. *Green v. Elgie*, 5 Ad. & Ell. N. S. 99.

of a court-baron is a judicial officer, and trespass will not lie against him, where his bailiff by mistake took the goods of B, under a precept commanding him to take in execution the goods of A.¹ So trespass does not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the facts might not have supported such complaint; more especially if such facts were not laid before them at the time, by the party complained against, having notice of such complaint, and being properly summoned to attend.² Thus if a person is charged on oath before a magistrate with felony, and he issues his warrant, and the charge is substantiated, and the offender committed to prison; the magistrate is not liable for false imprisonment, although the charge turns out to be unfounded.³ So an action will not lie against a justice of the peace, for issuing a writ in favor of a third person upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant his costs. It might be otherwise, if the defendant had known, when the action was commenced, that the claim was false and unjust, or if there had been a conspiracy between the parties to injure the plaintiff, in pursuance of which the writ was sued out and issued. But the act of the defendant was a judicial act, for which an action could not be maintained. The remedy of the plaintiff was a judgment for costs against the plaintiff in the former suit; which, being provided by statute, must be held exclusive and complete.⁴

§ 4. As has been seen, the general principle above laid down, in relation to judicial officers, has been often applied to the class familiarly known as *magistrates* or *justices of the peace*. (a) Thus

¹ Holroyd v. Breare, 2 B. & Ald. 473.

² Lowther v. Earl of Radnor, 8 E. 113.

³ Mills v. Collett, 3 Moo. & P. 212.

⁴ Raymond v. Bolles, 11 Cush. 315, 317.

(a) See Clark v. Spicer, 6 Kans. 440. In regard to this class of officers, whose duties in the United States are of the highest importance; it has been held, that nothing can be presumed in favor of the jurisdiction of a justice of the peace. State v. Hartwell, 35 Me. 129; Lane v. Crosby, 42 Me. 327. See State v. Baker, 50 Me. 45.

That, at common law, a justice was only a conservator of the peace. All civil jurisdiction is conferred on justices by statute. There is no presumption in law that a justice of the peace, of a foreign state, has jurisdiction to render judgment

in a civil action. Willey v. Strickland, 8 Ind. 453.

And that the jurisdiction of magistrates can arise only from the express provision of statute, and not from the agreement of parties. Call v. Mitchell, 39 Me. 465; Williams v. Bower, 26 Mis. 601. Which jurisdiction must be strictly pursued. Matlock v. Strange, 8 Ind. 57. And can never be inferred from the mere fact that a statute, by its phraseology, implies that their jurisdiction extends to a particular case. Hersom's case, 39 Me. 476.

But, on the other hand, in proceedings

an action for false imprisonment will not lie against a magistrate for imprisonment, in consequence of judicial acts done by him.¹ The rule, however, has been sometimes laid down in the qualified form, that trespass does not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances, necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate, for issuing a warrant of distress against him, upon a previous order of two magistrates for the relief of a member, in pursuance of the Statute 33 Geo. III. c. 54, § 15; it was held that the action could not be maintained; it appearing, on the face of the order, that the treasurer made no defence, the defendant's jurisdiction not having been questioned at the time, and the treasurer having neglected to present to his notice a rule of the society, which directed all disputes between its members to be referred to arbitration; and which rule was confirmed by section 16 of the statute, whereby the award was made conclusive, without being subject to the control of the magistrates.² So a justice, while acting honestly within the scope of his jurisdiction, will not be liable for issuing a *mittimus* on a judgment, upon which the plaintiff was imprisoned.³ So where a justice by mistake made an execution returnable in sixty instead of ninety days as required by law, whereby the plaintiff lost his debt; held, he was not responsible.⁴ So an action does not lie,

¹ Bushell's case, 1 Mod. 119; Hamond v. Howell, Ib. 184.

² Pike v. Carter, 10 Moore, 376; 3 Bing. 78.

³ Downing v. Herrick, 47 Me. 462.

⁴ Wertheimer v. Howard, 30 Mis. 420.

in cases arising before justices of the peace, much liberality is allowed in construing the acts of the parties, as well as of the justices themselves. *Mooney v. Williams*, 15 Mis. 442.

And it is also held, that the same rule of construction is extended in favor of the jurisdiction of justices of the peace, as of courts of general jurisdiction. *Wright v. Hazen*, 24 Vt. 143.

Although a justice of the peace may have removed from the county, yet, if he continues to exercise his functions, he is a justice *de facto*, and his acts will be binding on third persons unless he removed with the absolute intent to change his place of residence. *Lexington, &c. v. McMurtry*, 6 B. Monr. 214.

And the same rule applies, where a justice of the peace has accepted another office incompatible with that of a justice

of the peace. *Commonwealth v. Kirby*, 2 Cush. 577.

Where a game law provides, that any person carrying a gun without permission on land not his own, and for which the owner pays taxes or of which he is in the lawful possession, shall, upon conviction, either upon the view of any justice of the peace, or by sworn testimony of witnesses before such justice, pay a certain penalty; an action of trespass lies against a justice of the peace, who, with his own hands, arrests such trespasser. *Schroder v. Ehlers*, 2 Vroom, 44.

In such action the plea must aver that the owner was in lawful possession, or paid taxes, or, where the plaintiff's hands were tied upon his arrest, show circumstances justifying such act, or state what judgment was rendered by the defendant upon conviction. *Ibid*.

certainly without proof of malice, against a justice, for refusing to take bail on a charge of misdemeanor; his duty in this respect being not merely ministerial.¹ Nor, in general, for refusing an appeal,² nor for an error of judgment, in taking a recognizance to prosecute an appeal or other recognizance in a form not authorized by law, and therefore invalid.³ Nor against justices of the peace, for refusing a license to keep an inn or an ale-house.⁴ So where an attachment was issued, under the provisions of a statute, on the oath of a party, by which the constable was directed to attach the goods and chattels of the defendant, his arms and accoutrements excepted; held, an action of trespass did not lie against the justice, because the constable took and detained the party's arms and accoutrements.⁵

§ 4 *a*. But a justice of the peace, in making a return to a higher court upon an appeal, acts *ministerially*, and is responsible to the party injured for an error or misstatement in such return, though he be not influenced by corrupt motives.⁶ (*a*) Or for issuing an execution within two or three hours after judgment.⁷ Or against the body of a debtor, knowing it to be unlawful.⁸ Or for refusing an appeal and issuing execution, if he act corruptly.⁹ So case is held to lie against a justice of the peace, for that, after taking time to consider a case, he rendered judgment against the plaintiff, and deceitfully concealed the fact from him until it was too late to appeal.¹⁰ So a magistrate has no authority to order a person accused of a criminal offence, to be committed until a subsequent day for examination, without being first brought before

¹ Linford *v.* Fitzroy, 13 Ad. & Ell. N. S. 240.

² Jordan *v.* Hanson, 49 N. H. 199. See § 4 *a*.

³ Chickering *v.* Robinson, 3 Cush. 543; Way *v.* Townsend, 4 Allen, 114.

⁴ Bassett *v.* Godschall, 3 Wils. 121.

⁵ Collins *v.* Ferris, 14 Johns. 246.

⁶ Houghton *v.* Swarthout, 1 Denio, 589.

⁷ Briggs *v.* Wardwell, 10 Mass. 356.

⁸ Sullivan *v.* Jones, 2 Gray, 570.

⁹ Tyler *v.* Alford, 38 Me. 530.

¹⁰ Neighbour *v.* Trimmer, 1 Harr. (N. J.) 58.

(*a*) "The broad line of distinction is this; that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do any thing in the execution of that duty, unless he can be fixed with malice." Linford *v.* Fitzroy, 13 Q. B. 240, 247; Eng. Com. L. R. vol. 66.

An action was brought against justices of the peace, for making an order for payment of a rate, after the liability to such order had expired by lapse of time under the statute; which order was after-

wards quashed. The defence was, that such limitation had not taken effect. And judgment was given for the defendants, upon the ground that this was a question which they were bound to determine as justices, and that they were not liable without proof of malice and want of reasonable and probable cause. *Sommerville v. Mirehouse*, 1 Best & Smith, Q. B. 652; Eng. Com. L. R. 101.

(The judgment proceeded partly upon the ground that nothing was done to enforce the order.)

him. Accordingly, where a justice of the peace issued a warrant, for the arrest of an individual upon a criminal charge, late on Saturday night, with an indorsement thereon, directing that the accused should be committed until the following Monday, for examination, and the constable arrested the accused on the same evening and committed him to jail without first bringing him before the justice; held, that the justice had exceeded his authority, and that he, together with the constable and his assistants, was liable in trespass.¹ And trespass will lie against a magistrate, for committing a party, charged with felony, for re-examination, for an unreasonable time, though without any improper motive.² So if a justice of the peace, who has convicted a person of an assault and battery, allows him to go at large for nearly a year without payment of the fine and costs, and then issues a *mittimus*, without first issuing a *capias* for him to show cause why he should not be committed, the justice is liable in trespass.³ So a justice of the peace, who issues a warrant under an unconstitutional statute, is liable to an action by the party arrested. Bigelow, J., says: "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under Stat. 1852, c. 322, § 14. But that section of the statute has been adjudged to be unconstitutional and void. It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others."⁴

§ 5. As has been already explained, judicial protection extends to all judicial tribunals. The rule is laid down, that, if the judge of an *inferior court* has jurisdiction, although he may give a wrong judgment, provided the error results from the erroneous conclusion at which he arrives, neither the judge nor the plaintiff in the judgment can be made a trespasser, by virtue of enforcing the same, if the judgment remains unrescinded and unpaid.⁵ No person is liable in a civil action for what he has done as a judge, while acting within the limits of his jurisdiction.⁶ But it is to be

¹ Pratt v. Hill, 16 Barb. 303.

² Davis v. Capper, 10 B. & C. 28.

³ Doggett v. Cook, 11 Cush. 262.

⁴ Kelly v. Bemis, 4 Gray, 83.

⁵ Deal v. Harris, 8 Md. 40.

⁶ Burnham v. Stevens, 23 N. H. 247.

further remarked, that, if persons having a *special* or *limited* judicial authority do any act beyond the scope of their authority, they make themselves trespassers.¹ (See § 11.) Every such tribunal decides at its peril, and process issuing therefrom is no protection to the court, attorney, party, or even a ministerial officer who innocently executes it.² The jurisdiction, if not of record, must affirmatively appear on the face of the proceedings.³ It is said, "The general rule of law, as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action."⁴ More especially, even a judge of a court of record is answerable for an act done by his command, when he has no jurisdiction, and is not *misinformed* as to the facts on which jurisdiction depends. Thus the plaintiff, who dwelt and carried on business at Cambridge, out of the jurisdiction of the Spilsby county court, was sued in that court by leave of the judge, under Stat. 9 & 10 Vict. c. 95, § 60, the cause of action having arisen within the jurisdiction of the court; and judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby court, under § 98, calling upon the plaintiff to be examined as to his estate and effects, and, the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt. Held, the commitment was without jurisdiction, and, as the judge had ordered it under a *mistake of the law* and not of the facts, he was liable in trespass.⁵ So an action was brought against justices of the peace for ordering the assessment of a church-rate, which was disputed, and, such proceeding being forbidden by statute, it was held that the defendants had no jurisdiction, and were liable to this action.⁶ So a justice of the peace, failing to associate with him another justice, and admitting to bail or committing to jail any person on a felonious charge, such power being exercisable only by two justices, so exceeds his jurisdiction,

¹ Blood v. Sayre, 17 Vt. 609.

² Per Van Ness, J., Cable v. Cooper, 15 Johns. 157.

³ Wall v. Trumbull, 16 Mich. 228.

⁴ Per Abbott, C. J., Doswell v. Impey,

1 B. & C. 169; acc. Miller v. Seare, 2 W. Bl. 1141.

⁵ Houlden v. Smith, 14 Ad. & Ell. (N. S.) 841.

⁶ Pease v. Clayton, 1 Best & Smith, 658; Eng. Com. L. Rep. 101.

as to render void his acts in the premises, and to lay himself open to prosecution for damages at the suit of the person imprisoned or bailed.¹ So where judgment was rendered by a justice against A and B, co-defendants, over one of whom, A, he had no jurisdiction; and execution issued thereon, in its terms leviable on the individual property of either defendant: held, the justice was liable in damages for a levy upon the property of A.² (a) So the warrant of a justice of the peace, who had no jurisdiction of the matter, is void, and the magistrate and all who act under it are liable for damages.³ So a magistrate who renders judgment for the plaintiff, and at his request issues an execution which is invalid upon its face, is liable to an action therefor.⁴ And, in general, a justice of the peace, who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, more especially knowing the facts which constitute the defect of jurisdiction, is held liable in damages to any party injured.⁵ So a justice of the peace, who, in the course of the trial of a case, of which a police court has exclusive jurisdiction, or after finally disposing of a case, commits a witness to prison for contempt, is liable to an action by the witness.⁶ (b) And, upon the same principle, where persons not inhabitants of a town are not liable to be taxed for the support of common schools in that town; if a tax be levied and assessed upon the property of such non-resident, *the trustees* who issue the warrant, as well as the collector who executes it, have been held trespassers.⁷ So trespass will lie against a *deputy clerk* for wrongfully issuing an execution, under which the plaintiff's property was sold.⁸ So, a *commissioner in chancery* having no power to commit a witness who refuses to testify before him; if he does it, he is a trespasser.⁹

§ 6. It is laid down, as a general rule, that justices of the peace,

¹ Revill v. Pettit, 3 Met. (Ky.) 314.

² Inos v. Winspear, 18 Cal. 397.

³ Cohoon v. Speed, 2 Jones, 133.

⁴ Noxon v. Hill, 2 Allen, 215.

⁵ Piper v. Pearson, 2 Gray, 120 (overruled, Hendrick v. Whittemore, 105

Mass. 23); Clarke v. May, Ib. 410; Knowles v. Davis, 2 Allen, 61.

⁶ Piper v. Pearson, 2 Gray, 120.

⁷ Suydam v. Keys, 13 Johns. 444. But see Chegary v. Jenkins, 5 N. Y. 376.

⁸ Coltraine v. M'Cain, 3 Dev. 308.

⁹ Marsh v. Williams, 1 How. (Miss.) 132.

(a) The execution plaintiff, who requested the issue of the execution, and participated in the proceedings under it, was also held liable. 18 Cal. 397

(b) A justice of the peace may, in good faith and to preserve order, by parol, order one into the custody of the sheriff, and to be tied, who interrupts and insults him, while officially engaged, and is otherwise

behaving in a disorderly way. Furr v. Moss, 7 Jones, 525.

It is sometimes held, that a justice has no power to commit for contempt. But where the court erred in deciding otherwise, in an action of trespass against the justice, but admitted evidence of the circumstances of the alleged contempt; the error was held to be cured. Albright v. Lapp, 26 Penn. 99.

where the forms of law are substantially complied with, though the precision proper to be observed in indictments may be wanting in complaints before them, ought not to be held liable in damages, for acts done in the performance of their official duties.¹ But a magistrate is bound by an erroneous commitment, notwithstanding a previous regular conviction. Where, therefore, a warrant of commitment, under the Stat. 5 Geo. IV. c. 14, for fishing in a private fishery, did not state that the offence was committed in enclosed ground; held, an action for false imprisonment was maintainable against the magistrate.² So in an action against a magistrate for false imprisonment, the plaintiff proved a commitment for a certain alleged offence. The defendant proved a conviction of the plaintiff for an offence different from that recited in the commitment. Held, this conviction was no justification of the imprisonment.³ So the plaintiff appeared before the defendant, a magistrate, to answer the complaint of A for unlawfully killing his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said "he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said "he would appeal." The defendant then called in a constable, and said, "Take this man out, and see if they can settle the matter; and if not, bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money. Held, an assault and false imprisonment; and, as no conviction had been drawn up, the defendant could not justify.⁴ But, where a justice of the peace has jurisdiction, his conviction is held conclusive evidence of the facts stated therein, if no defect appear on the face of it. Therefore, in an action of trespass against two justices, for seizing and detaining a decked and registered vessel on the Thames, having gunpowder on board, under the Bum-Boat Act, 2 Geo. III. c. 28, the owner cannot be let into evidence to show that she was not a boat within the meaning of that statute.⁵

§ 7. The question of judicial privilege has been raised, in case of positive neglect or violation of official duty, and where the party complaining was himself in fault. Thus, where a party brings a *certiorari* to reverse a judgment in a justice's court, and

¹ Alexander v. Card, 3 R. I. 145.

² Wickes v. Clutterbuck, 10 Moore, 63.

³ Rogers v. Jones, 3 B. & C. 409.

⁴ Bridgett v. Coyney, 1 M. & Ry. 211.

⁵ Brittain v. Kinnaird, 4 Moore, 50.
See Clapper, 3 Hill, 456.

the judgment is affirmed by default of the plaintiff in error, in not appearing when the cause is called on the calendar; he may, notwithstanding, bring an action against the justice for a false return, who cannot plead that the judgment was affirmed by the default of the plaintiff.¹ So the question has arisen, as to the liability of a judge for excluding a party from a court-room. Thus a summary statutory proceeding, for keeping and using a gun to destroy game, was held to be of a judicial nature, at which all persons *primâ facie* have a right to be present. Hence an action of trespass was held to lie against a magistrate, who, during such a proceeding, without any specific reason, caused the plaintiff to be removed from the room, the latter claiming a right to be present.² But trespass cannot be maintained against a coroner for ejecting a person from a room where he is about to take an inquisition.³ And it has been recently decided, that a justice of the peace, in the progress of a trial before him, has the power to cause any person to be removed from the court-room, whose presence, in the exercise of a sound judicial discretion, he deems prejudicial to the interests of justice.⁴

§ 8. It has been held that an action does not lie against a person, for assuming without authority to act in a judicial capacity. Thus where A was selected by the principal in a debtor's relief bond, to act as a magistrate in an adjudication upon the debtor's disclosure, and, upon such disclosure, united with B, the other magistrate, in giving a discharge-certificate to the debtor, when in fact A had no authority to act as such magistrate; and thereby the surety in the relief-bond was compelled to pay it: held, the surety could not sustain an action against A, for wrongfully assuming to act as sub-magistrate.⁵

§ 9. A judicial officer cannot protect himself from a liability already incurred, by virtue of any illegal arrangement between the parties to the proceeding before him, in reference to the disposition of that cause. Thus a statute provided, that any person, maliciously disturbing any dissenting congregation under that act, on proof before a justice of the peace, should find sureties in £50, or in default be committed to prison till the next sessions, and on conviction forfeit £20 to the crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a

¹ Kidzie v. Sackrider, 14 Johns. 195.

² Daubney v. Cooper, 10 B. & C. 237.

³ Garnett v. Ferrand, 6 B. & C. 611.

⁴ The State v. Copp, 15 N. H. 212.

⁵ Brookings v. Cunningham, 33 Me. 103.

commitment for want of sureties ; that, before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the defendants, that the prosecution should be dropped, and the plaintiff discharged at the sessions for want of prosecution ; and that the plaintiff was accordingly then and there so discharged, in full satisfaction and discharge of the assault and imprisonment. Held, no legal satisfaction ; for either the agreement was illegal, as stifling a prosecution for a public misdemeanor, and thereby impeding the course of justice ; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices, their authority being at an end after the commitment, and their consent, subsequent to the dropping of the prosecution, a mere nullity.¹

§ 10. The protection and privilege in question have been held not to excuse gross ignorance and incapacity on the part of one assuming to serve in a *quasi* judicial capacity. Thus the declaration stated, that the plaintiff, rector of F, agreed with the executrix of the late incumbent, that dilapidations should be valued, as between them, by valuers to be appointed on each side, and, in case the valuers disagreed, by an umpire to be appointed by the valuers, and that such valuation should be final and conclusive ; that the plaintiff, at the request of the defendants, employed them as valuers, for reward, to value the dilapidation on his behalf, and to use their best endeavors to procure the same to be settled at a reasonable amount as between the plaintiff and the executrix ; and the defendants accepted the employment, and entered upon it, with a valuer appointed by the executrix on her behalf. Breach, that, through the defendants' negligence, the amount of dilapidations was settled by them and the valuer, at a less sum than they ought to have been settled at, whereby the plaintiff was obliged to accept from the executrix a smaller sum than he ought to have received. The evidence was, that the defendants were employed as alleged, and had agreed with the valuer of the executrix in valuing the dilapidations at too small a sum ; having, through ignorance, valued as between incoming and outgoing tenant, instead of as between incoming and outgoing incumbent. Held, first, that the defendants were not sued as *quasi* arbitrators ; but that the cause of action was their undertaking that they were competent, and the breach of that undertaking ; and, secondly, that, although the defendants could not be expected to supply minute

¹ Edgcombe v. Rodd, 5 E. 294.

and accurate knowledge of the law, they ought to have known the broad distinction between the case of a tenant and that of an incumbent, and that their ignorance in that respect was a breach of their engagement.¹

§ 11. As has been already seen, it is a general qualification of judicial privilege, that judicial officers are not liable to action or indictment, for acts done by them in a judicial capacity *within their jurisdiction*.² But, where justices or other judicial officers decide on a matter *not within their jurisdiction*, they are liable in an action. (a) And the doctrine has been broadly stated to apply, whether the want of jurisdiction applies to *place, persons, or subject-matter*.³ But in reference to this doctrine, and the case upon which it chiefly rests, it has been well remarked: "In the case of *Terry v. Huntington*, Hardr. 480, the court seem to have been of opinion, that in an action of trespass the plaintiff might show, that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, *i.e.*, in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray v. Cookson*.⁴ In these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where the question of jurisdiction arises upon matter of fact in the course of a cause, and therefore neces-

¹ *Jenkins v. Betham*, 29 Eng. L. & Eq. 283. See *Pappa v. Rose*, L. R. 7 C. P. 32.

² *Yates v. Lansing*, 5 Johns. 282; 9 Ib. 395; *Moor v. Ames*, 3 Caines, 170; *Bro-*

die v. Rutledge, 2 Bay, 69. See *Wingate v. Haywood*, 40 N. H. 437; *Rivenburgh v. Henness*, 4 Lans. 208.

³ *Terry v. Huntington*, Hardr. 480.

⁴ 16 E. 13.

(a) In illustration of the respective liabilities of *judges, officers, and parties* it is remarked in an old and leading case: "The plaintiff has been illegally imprisoned under color of a writ sued out against him which is a mere nullity. He has been unlawfully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the command of the court, and he may justify under the writ though it be

void. (6 Rep. 54 a.) But where a court has no jurisdiction of the cause, the whole is *coram non judice* (2 Stra. 991), and trespass and false imprisonment would lie against the vice-chancellor, judge, jailer, officer, and all of them. (10 Rep. 76 a, b.)" 3 Wils. 345.

Payment of a note before judgment upon it does not make the judgment void, so that the judgment creditor becomes a trespasser by suing out execution upon it. *Barnett v. Reed*, 51 Penn. 190.

sarily becomes the proper subject of adjudication in the cause.”¹ (See chap. 29, § 3.)

§ 12. The exemption of judicial acts from liability for damages is sometimes stated with the qualification, that, if such acts are done wilfully, fraudulently, corruptly, or *maliciously*, (a) the privilege does not apply. The malice, however, intended by the law in cases of this description, can hardly mean *actual* malice towards the party injured, but only that sort of implied malice which consists in, or is to be inferred from, a violation of some rule by which the proceeding should have been governed. Substantially the same principle is stated and illustrated by an approved elementary writer, as follows: “The plaintiff may rebut the evidence of a conviction or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent, and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it; or in case of a distress, or commitment under a conviction, that he was never summoned, and therefore had no oppor-

¹ 2 Stark. Ev. 809.

(a) *Bevard v. Hoffman*, 18 Md. 479; *Morgan v. Dudley*, 18 B. Monr. 693. See *Gregory v. Brooks*, 37 Conn. 365. Thus it is held, that an action will not lie against a justice for a judicial act within his discretion, unless he has acted from malicious, impure, and corrupt motives. *Gregory v. Brown*, 4 Bibb, 28; *State v. Campbell*, 2 Tyl. 177; *Bullitt v. Clement*, 16 B. Monr. 193.

So, that a justice acting officially, with jurisdiction *and in good faith*, is not answerable in trespass for his acts, although erroneous. *Hetfield v. Towsley*, 3 Iowa, 584.

A justice has been held liable to an action, for maliciously and unjustly refusing to grant an appeal. *Hardison v. Jordan*, Cam. & Nor. 454.

Where a justice of the peace maliciously grants a warrant against another without any information, upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case. *Morgan v. Hughes*, 2 T. R. 225.

In trespass for an assault and false imprisonment, the defendant pleaded, that he was a justice of the peace, that a felony had been committed, that there was reasonable ground for suspicion that the plaintiff was guilty of said felony, and

that, in consequence thereof, he had ordered the plaintiff to be arrested. Held, the plea was bad, for omitting to set out the grounds upon which the suspicion and belief of the plaintiff's guilt were founded. *Wasson v. Canfield*, 6 Blackf. 406.

In an action against a magistrate for a malicious conviction, the question is not, whether there was probable cause in fact for convicting, but whether he had any probable cause for convicting. *Burley v. Bethune*, 5 Taunt. 580.

In other words, in an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune*, 1 Marsh. 220.

In a very late case an action was sustained against a justice, who ten weeks after trial issued a *mittimus*. *Fisher v. Deans*, 107 Mass. 118.

A justice of the peace caused executions to issue in several suits against a person not a party to the suits, and at the sale thereunder purchased the property seized. Held, the justice and the constable were bound to restore the property to the owner or to pay him its value. *Ter-rail v. Tinney*, 20 La. Ann. 444.

tunity to make his defence.”¹ On the other hand, malice does not render an official act unlawful.² In an action on the case, it was alleged in the declaration, that the defendant, a justice of the peace, wilfully and maliciously received a false and groundless complaint against the plaintiff, for a criminal trespass, and thereupon wilfully and maliciously issued his warrant, upon which the plaintiff was arrested and carried before the defendant for trial, and was by him wilfully and maliciously tried and convicted, without being allowed an opportunity to obtain witnesses and counsel; that, upon such conviction, the defendant maliciously sentenced the plaintiff to pay a fine of two dollars and costs, and that, upon his refusing to pay the same, the plaintiff was committed, by the order and warrant of the defendant, to the common jail, where he remained imprisoned for one day, until, to obtain his discharge therefrom, he was obliged to and did comply with the defendant's order to pay the fine and costs imposed upon him by the sentence. Held, on general demurrer, that the action could not be maintained.³ Shaw, C. J., remarks: “It is alleged that the complaint was false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. His private knowledge could not prevent the complainant from having it tried. It is further alleged, that the defendant wilfully and maliciously tried and convicted the plaintiff, and sentenced him to pay a fine of two dollars and costs. The plaintiff alleges that he was not guilty, and that the defendant knew he was not guilty. These are facts, which the defendant is not bound to contest with the plaintiff. It is stated that the defendant put the plaintiff on trial without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel. If this were so, however wrong in itself it might be, it cannot be tried here. Where the subject-matter and the person are within the jurisdiction of the justice, the question of continuance or postponement, for any purpose, is a judicial question, as much as the question whether the party on trial is guilty or not guilty.”⁴ (a)

¹ 2 Stark. Ev. 807.

² Moran v. M'Clearus, 4 Lans. 288.

³ Pratt v. Gardner, 2 Cush. 63.

⁴ Pratt v. Gardner, 2 Cush. 63, 71, 72.

(a) In reference to the mere *allegation* of malice in a case of this nature, the learned judge speaks of “leaving out the epithets ‘maliciously,’ ‘wilfully,’ ‘falsely,’

with which the declaration is so thickly sprinkled, and which cannot change or qualify the material facts.”

CHAPTER XXIX.

MINISTERIAL OFFICERS. — SHERIFFS, ETC. — GENERAL LIABILITIES AS TO THE SERVICE OF PROCESS.

1. General rights and duties of ministerial officers.
2. Jurisdiction, as affecting their liability.
3. Burden of proof; application of the rule "in pari," &c.
5. Justification of an officer, as depending upon the liability to seizure of person or property.
9. Title of an officer to property taken by him, and right of action therefor.
10. Actions against officers; form, &c.
11. Notice, before service of process. Purpose and intent, as affecting an officer's liability.
14. Return of process.
21. Rights and liabilities of a sheriff in connection with his *deputies*.
29. Justification of persons acting under an officer.
30. Liability of *parties* for the acts of officers.
34. Damages.

§ 1. THE other general class of public officers, by or against whom a private wrong may be committed, is that of *ministerial* officers, consisting chiefly of sheriffs and other officers of the law, charged with the execution of legal process. (a) And, with regard to

(a) With regard to officers in general — though in practice the remark is oftener applied to ministerial than judicial officers — it is said, that an officer *de facto* is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished, on the one hand, from a mere usurper of an office, and on the other, from an officer *de jure*. *Plymouth v. Painter*, 17 Conn. 585. See *M'Cahon v. County*, 11 Am. Law Reg. 269; *State v. Tolan*, 33 N. J. 195; *M'Cormick v. Fitch*, 14 Minn. 252; *People v. Albany*, 55 Barb. 344; *Pool v. Perdue*, 44 Geo. 454; *Wayne v. Benoit*, 20 Mich. 176; *Prell v. M'Donald*, 7 Kans. 426; *Kimball v. Alcorn*, 45 Miss. 151; *Hamlin v. Dingman*, 5 Lans. 61; *Hawyer v. Seldenridge*, 2 W. Va. 274; *Brown v. Wylie*, 2 W. Va. 502; *Wayne v. Benoit*, 20 Mich. 176; *Bates v. Dyer*, 9 Humph. 162; *Carleton v. People*, 10 Mich. 250; *Keeney v. Leas*, 14 Iowa, 464; *Curtis v. Fay*, 37 Barb. 64; *The State v. Jones*, 19 Ind. 356; *Leach v. Cassidy*, 23 Ind. 449.

Persons entering into office under color of an election, although irregular, are thereby constituted officers *de facto*, and their official acts have full force until they

are removed by a writ of *quo warranto*. *Commissioners v. McDaniel*, 7 Jones, 107.

Officers properly elected, but who refuse to qualify, may be officers *de facto*, as to third parties. *Coles v. Allison*, 23 Ill. 437.

The acts of officers *de facto* are valid, when they concern the public, or the rights of third persons who have an interest in the act done. But a different rule prevails, where the act is for the benefit of the officer, because he is not permitted to take advantage of his own wrong. *Venable v. Curd*, 2 Head, 582; *Patterson v. Miller*, 2 Met. (Ky.) 493; *Gourley v. Hanks*, 2 Clarke (Iowa), 75.

After the enactment of a law, but before the publication necessary to make it operative, a judge and clerk of the court were elected under it. Held, on *habeas corpus* from a commitment by those officers after publication, that they were then, at least, officers *de facto*, exercising a legal office under color of right, and that their right could not be inquired into on a collateral proceeding. *Boyle*, 9 Wis. 264.

In reference to an English statute, passed for the benefit and protection of officers, it is said, "The defendant acted

mere ministerial officers, although not entitled to the peculiar protection which the law extends to those acting in a *judicial* capac-

colore officii, and not *virtute officii*. A constable acting *colore officii* is not protected by the statute (24 Geo. II. c. 44, § 8). Where the act committed is of such a nature, that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer. But where a man doing an act within the limits of his official authority, exercises that authority improperly or abuses the discretion placed in him, to such cases the statute extends. The distinction is, between the extent and the abuse of the authority." Per *Ld. Kenyon, Alcock v. Andrews*, 2 Esp. N. P. 542, n. See *Smith v. The State*, 19 Conn. 493.

The Constitution of Connecticut provided that judges should be elected by the legislature. A judge of a city court being so elected, it was provided by law, that in case of his sickness or absence a justice of the peace should be called in by the clerk to hold the court as acting judge. This being done, it was held, that, although the law were unconstitutional, or the call not legally recorded, such justice was an officer *de facto*, and his judgments were valid. *State v. Carroll*, (Conn.) Am. Law Reg. March, 1873, p. 165.

The general rule has been applied in case of a judicial officer appointed by a provisional military governor. *Cooper v. Moore*, 44 Miss. 386.

If an officer is eligible and has taken such oaths as he supposed to be required, he may be deemed an officer *de jure* as well as *de facto*, until a regular proceeding and a judgment declaring his office vacant. *Morgan v. Vance*, 4 Bush, 323.

If ineligible, he cannot justify under his office. *Ibid*.

In Kentucky where the election and installation are regular, and he was eligible, or could take the *duelling oath* if required; if, upon proper proceedings to vacate the office because he has not taken the oath, it should appear before the trial that he has taken it, this would defeat any judgment of vacation of the office. *Ibid*.

In recent cases, the following distinctions are made. When one is discharging the general duties of an office, claiming under a commission or appointment, he is an officer *de facto*; and generally, if not universally, his acts are good as to third parties, however irregular his appointment or qualification, and notwithstanding he may be personally liable to a party aggrieved by his official action. *Rice v. Commonwealth*, 3 Bush, 14.

The acts of an officer *de facto*, though

his title may be defective, are valid as to the public, or third persons who have an interest in the things done. Even in the case of an action where the officer is a party to the record, if it concern the public, his title cannot be questioned, unless in a direct proceeding to contest it. *Gumberts v. Adams*, 28 Ind. 181.

Omission of an officer, to comply with the statute regulating the discharge of his duties, may amount to a misdemeanor, though the provisions are, as respects the public, merely directory. *Case v. Dean*, 16 Mich. 12.

The acts of persons, claiming to act as officers under the authority of the usurped government at Richmond, within the county of Monroe, after the inauguration of the State of West Virginia, and who certified themselves to be officers of that government, are void. *Brown v. Wylie*, 2 W. Va. 502.

So the acts of all officers, claiming allegiance to and adhering to the government of a State in insurrection or rebellion. *Hawyer v. Seldenridge*, 2 W. Va. 274.

The acts of a *de facto* officer, when the government is wholly revolutionized, are, *ex necessitate*, valid; provided he exercise the functions of a *de jure* or *de facto* officer. *Ibid*.

That one is a *de facto* officer, may be proved by parol evidence. *Druze v. Wheeler*, 22 Mich. 439.

It is held to furnish no justification to the officer himself. *Kimball v. Alcorn*, 45 Miss. 151. See *Cooper v. Moore*, 44 Miss. 386.

The general rule is held applicable to one acting under an unconstitutional statute. *Strang*, 21 Ohio St. 610.

But a judgment in the highest court of a State, that an acting officer has no title to the office, determines his authority, at least with reference to parties having notice; although an appeal has been taken to the Supreme Court of the United States. *Rochester v. Clarke*, 60 Barb. 234.

With respect to the general responsibility of officers of the law to parties who may be injured by their neglect or violation of official duty; it is held that no action lies at the suit of an individual against an officer, for misbehavior in office, either from misfeasance or nonfeasance, unless the plaintiff can show a special damage peculiar to himself. *Butler v. Kent*, 19 Johns. 223; *Harrington v. Ward*, 9 Mass. 251.

But, whether the damage is suffered by

ity; yet the general principle is laid down, that, if a public officer errs in the discharge of his duty in good faith, he is not liable.¹ More especially, where he is required to *exercise his judgment*, or does an act as judge or a judicial act, which is within his power and jurisdiction; unless it be proved that the act alleged to be injurious was wilful and malicious.² It is said, "We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment."³ And the same protection has been extended to an immediate officer of a court, and acting in execution of an order of such court. Thus, in an action on the case against an officer of the Insolvent Debtor's Court, for improperly drawing up an order for the dis-

¹ Donahoe v. Richards, 38 Me. 376.

² Reed v. Conway, 20 Mis. 22.

³ Per Taney, C. J., Kendall v. Stokes, 3 How. 97.

the act or omission of a public officer, contrary to his duty, the party injured may maintain an action on the case against the officer. *Bartlett v. Crozier*, 15 Johns. 250.

Thus a sheriff is not liable to the action of a party injured by his neglect to preserve the peace; but only for his misfeasance or neglect in serving a process in which the plaintiff is interested, or for maliciously hindering or preventing the plaintiff from exercising some special right or privilege. *South v. Maryland*, 18 How. (U. S.) 396.

And the further distinction is laid down, that, if an officer is guilty of any act, under color of his office, directly affecting the rights of parties not named in his precept, they have a remedy against him. But if he omits the performance of any duty resulting from a precept in his hands, those alone can maintain an action against him therefor, who are parties thereto. *Moulton v. Jose*, 25 Me. 76.

But the surety in an injunction bond may maintain an action against the sheriff, for leaving in the hands of the debtor property delivered to the sheriff by the debtor, and subsequently carried out of the State; whereby the surety was obliged to pay the debt. *Rowe v. Williams*, 7 B. Monr. 202.

In general, an officer may justify by the express terms of his process. Thus, where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against

the sheriff, though he claimed to be only a surety, and though the plaintiff in the execution directed the sheriff to collect it from the other. *Shufford v. Cline*, 13 Ired. 463. (See chap. 30.)

The fact, that an officer is general agent for the collection of a debt, does not absolve him from his duties and liabilities as an officer, where he obtains a judgment on a note, and the *fi. fa.* comes to his hands. *Clingman v. Barrett*, 6 Humph. 20.

An officer is liable for any oppression. So also the party for whom he acts. So an officer is liable for any abuse of trust, though no intentional wrong is proved against him. *Cantrine v. Clark*, 41 Barb. 629.

"If a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." Per Best, C. J., *Henly v. Mayor, &c.*, 5 Bing. 107.

Gross negligence in the discharge of a fiduciary duty is evidence of fraud and misbehavior in office. *Commonwealth v. Rodes*, 6 B. Monr. 171.

An habitual neglect to account for small sums by a public officer authorizes and requires the presumption, that the sums retained and not accounted for were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts, instead of rebutting such presumption, strengthens and supports it. *Commonwealth v. Rodes*, 6 B. Monr. 171.

charge of an insolvent, instead of his further imprisonment, the declaration alleged, that such officer wrongfully, falsely, and unlawfully made and issued a certain order, purporting to be an order from the court. Held, on general demurrer, that, as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the court itself; the action could not be maintained by a creditor of the insolvent against the officer, for the discharge of the insolvent under such order.¹

§ 2. In relation to that class of ministerial officers, whose authority is most frequently questioned, viz. : sheriffs and other officers, acting under the writs, warrants, or other precepts of courts and magistrates; the rule already stated in relation to judicial officers (chap. 28) is equally applicable, that, where a court has *jurisdiction* of the person and the subject-matter, the officer is not bound to examine into the validity of its proceedings or the regularity of its process; and is not liable, certainly without proof of express malice.² But *want of jurisdiction* in the court deprives the officer of the benefit of the process under which he seeks to justify himself. (a) Thus a warrant, issued by a justice of the peace without authority, affords no justification to the officer executing it.³ Hence, where the law does not authorize a justice of the peace to receive a complaint and issue a warrant on the Lord's day, for a violation of the law merely by travelling; an arrest made on the Lord's day, by virtue of a warrant so issued, is held illegal, and the officer making it is a trespasser.⁴ So an execution, issued by a magistrate against a person who has not been summoned before him, is void,

¹ Whitelegg v. Richards, 6 Moo. 501. But see 2 B. & C. 45.

² Brown v. Mason, 40 Vt. 157; Shaw v. Davis, 55 Barb. 389; Hicks v. Dorn, 1 Lans. 81; M'Lean v. Cook, 23 Wis. 364; Warner v. Shed, 10 Johns. 138; Dyne v. Hoover, 20 How. (U. S.) 65; Woods v. Davis, 34 N. H. 328. See Gray v. Kim-

ball, 42 Me. 299; Mason v. Vance, 1 Sneed, 178; Ortman v. Greenman, 4 Mich. 291.

³ Stephens v. Wilkins, 6 Barr. 260; Hull v. Blaisdell, 1 Scam. 332.

⁴ Pearce v. Atwood, 13 Mass. 324. See Sanborn v. Fellows, 22 N. H. 433.

(a) It is held, that, where an officer acts under process in the discharge of his ministerial duty, and does not exceed his authority, he will be protected though the process is not sufficient; but where he acts officiously and as a volunteer, he must himself show that the process was legal and sufficient. Hunt v. Ballew, 9 B. Monr. 390.

Upon a motion to discharge, notwithstanding the return of an officer, evidence is admissible, that, under pretence of a writ, he brought property from another

county into his own, and there levied upon it. Pomroy v. Parmlee, 9 Iowa, 140.

The *ignorance* of a sheriff as to his duty cannot protect him. York v. Clopton, 32 Geo. 362.

An officer is not liable for an arrest made without actual knowledge of the magistrate's want of authority, arising from some fact not disclosed by the precept; as that he was the attorney of record of the judgment creditor making the affidavit. Chase v. Ingalls, 97 Mass. 524.

and the constable who levies such execution is a trespasser.¹ So where a justice notifies a constable, that an appeal has been entered, and execution in his hands superseded, any subsequent sale under the execution is void, and the constable is a trespasser. The regularity of the appeal is the justice's business and not the constable's.² And, in general, where a court of competent jurisdiction issues a *supersedeas* to an execution in the hands of a sheriff, he need look no farther, but is bound to obey it; it is not for him to inquire of the propriety of granting the *fiat*.³ (a) So an officer will be protected in the execution of legal process, more especially issuing from a court of general jurisdiction, if it appears upon the face of the process that the subject-matter is within the jurisdiction of the court.⁴ So an officer is protected in the execution of process issued by a justice of the peace, which shows upon its face that the justice had jurisdiction of the subject-matter, if nothing appears to apprise him that the justice had not jurisdiction of the person. And the still more favorable rule has been adopted, that the process protects the officer, even though issued by a justice of the peace, unless it appears on its face that it was issued by a court not having jurisdiction of the person, or unless he had notice in some other way that the process was issued without authority of law.⁵ And it has even been held sufficient justification, if a

¹ Tobin v. Addison, 2 Strobb. 3.

² O'Donnell v. Mullin, 27 Penn. 199.

³ Williams v. Stewart, 12 S. & M. 533.

⁴ Camp v. Moseley, 2 Flor. 171; Smith v. Miles, 1 Hemp. 34.

⁵ McDonald v. Wilkie, 13 Ill. 22; Barnes v. Barber, 1 Gilm. 401; Parker v. Smith, Ib. 411; Tefft v. Ashbaugh, 13 Ill. 602; Whipple v. Kent, 2 Gray, 410;

Churchill v. Churchill, 12 Vt. 661. See Miller v. Grice, 1 Rich. 147; State v. Crow, 6 Eng. 642; Higdon v. Conway, 12 Mis. 295; Camp v. Moseley, 2 Flor. 171; Decker v. Bryant, 7 Barb. 182; Holmes v. Nuncaster, 12 Johns. 395; Yates v. St. John, 12 Wend. 74; Harget v. Blackshear, Tayl. 107; Damon v. Bryant, 2 Pick. 411; Campbell v. Webb, 11 Md. 471.

(a) The distinction is made, that a warrant, fair on its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it, as against the person named in the warrant; but where the rights of third persons are affected by the execution of the warrant, the preliminary proceedings establishing jurisdiction must be shown. Decker v. Bryant, 7 Barb. 182.

It is to be observed, that, in general, the *right* of an officer to serve a process is the measure of his liability for neglecting to serve it. Thus a sheriff, who receives an execution in favor of a private corporation, of which he is a member, is not liable for neglecting to levy and return it; although he served the original writ, by attaching property, and took a receipt for the property, and had prosecuted a suit

against the receptor to final judgment, which was unsatisfied by reason of the insolvency of the receptor. Bank, &c. v. Parsons, 21 Vt. 199.

A sheriff, having an execution running against the body of a party not liable to arrest, is not a trespasser for arresting him. And, on the other hand, the sheriff is not liable, in such case, for not making the arrest. State v. Hamilton, 9 Mis. 784.

When a constable, employed to levy an attachment, becomes satisfied that there is a want of jurisdiction, he may stop, and, if sued, may show such want of jurisdiction in his defence, although he collected some of the amount and return a partial collection. Tucker v. Malloy, 48 Barb. 85.

When, from the absence of any thing to the contrary on the record, it appears

process is regular and legal on its face, though the officer has knowledge of facts rendering it void for want of jurisdiction.¹ Thus a constable, who, pursuant to the unauthorized orders of a justice of the peace, arrests a witness and takes him before the justice to answer for a contempt, and commits him to prison, is not liable to an action, unless the justice's want of authority appears on the face of the *capias* or *mittimus*.² So, although the interest of a justice of the peace in a penalty, though ever so minute, takes away his jurisdiction of an offence, it is said to be not certain, that the officer who serves the process in such a case may not be protected against a suit for damages.³ So, if a justice of the peace, having been legally qualified to act as such, continues to act in the same capacity after accepting an incompatible office, he will be considered as a justice of the peace *de facto*, so far as third persons are concerned, and his warrant will justify the officer to whom it is directed in making service thereof.⁴ So if the writs of attachment, under which the sheriff justifies, are regular on their face, he is not bound to go beyond them, and show affidavits and bonds, or that there was a subsisting debt, on which they might properly issue.⁵ And an officer is bound to serve an execution or other process regular on its face, and issued by a court having jurisdiction, though there be irregularity or error in the proceedings.⁶ So it is held, that an action does not lie against a sheriff or his officer, for having arrested a certificated bankrupt, a discharged insolvent debtor, a peer, a party to a cause, or a witness *eundo vel redeundo*.⁷ Nor, it seems, for seizing under an execution *privileged articles*, such as arms for muster; at all events unless done with a knowledge that they are privileged.⁸ So an officer, who holds an execution in the common form, issued by a court having jurisdiction, against a defendant who had been discharged under an insolvent law, after the judgment was rendered, is not liable to an action of trespass, for arresting and committing

¹ The People v. Warren, 5 Hill, 440. See Sprague v. Birchard, 1 Wis. 457; Buf-fandeau v. Edmondson, 17 Cal. 436; Billings v. Russell, 23 Penn. 189.

² 2 Gray, 410.

³ Pearce v. Atwood, 13 Mass. 324.

⁴ Commonwealth v. Kirby, 2 Cush. 577.

⁵ Kirksey v. Dubose, 19 Ala. 43.

⁶ French v. Willet, 4 Bosw. 649; Cady v. Quinn, 6 Ired. 191. See 8 B. Monr. 109.

⁷ Tarlton v. Fisher, 2 Doug. 671-677; Woods v. Davis, 24 N. H. 328.

⁸ The State v. Morgan, 3 Ired. 186.

that a writ of assistance was issued without authority by the clerk, the plaintiff cannot recover of the sheriff for refusing to execute it, even though the writ is regular on its face, and sufficient to pro-

tect him. Loomis v. Wheeler, 21 Wis. 271.

In an action for failing to execute a *capias*, it is no defence that there was no affidavit which authorized such process. Spence v. Tuggle, 10 Ala. 538.

such defendant, although the defendant shows his discharge to the officer before he is arrested.¹ So an officer holding an execution issued by a court of competent jurisdiction is not liable, though the judgment has been paid;² nor is he bound to investigate the genuineness or sufficiency of a receipt shown to him by the debtor in settlement of the judgment.³ Nor is it an excuse for a sheriff's failing to levy an execution upon a judgment, that the consideration of the judgment had failed.⁴ So an action will not lie against an officer who arrests *Jonathan A. Trull* on an execution against *George A. Trull*, the former being the real defendant, and having been served with the original process, by the same erroneous name, but having suffered judgment by default.⁵ Nor for serving an execution, issued on a judgment rendered against a person described as being of A, when in fact he dwelt in B. The mistake in the addition of place should have been taken advantage of in abatement in the original action.⁶ (a) Though if an execution issue against an aggregate corporation by the name of "The President, Directors, and Company," &c., with directions to the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution.⁷ (b) Nor, as is held, is a sheriff liable for executing, or justified in refusing to execute, a writ issued under the judgment of a court having jurisdiction of the person and subject-matter, although *the judgment be erroneous*.⁸ (c) Nor for serving a warrant, issued

¹ *Wilmarth v. Burt*, 7 Met. 257.

² *Mason v. Vance*, 1 Sneed, 178.

³ *Twitchell v. Shaw*, 10 Cush. 46.

⁴ *Arnold v. Commonwealth*, 8 B. Monr. 109.

⁵ *Trull v. Howland*, 10 Cush. 109.

⁶ *Smith v. Bowker*, 1 Mass. 76.

⁷ *Nichols v. Thomas*, 4 Mass. 232. See *Sanders v. Dowell*, 7 S. & M. 206.

⁸ *Milburn v. Gilman*, 11 Mis. 64; *Suydam v. Keys*, 13 Johns. 444. See *Bank v. Matson*, 26 Mis. 243; *Griswold v. Chandler*, 22 Tex. 637; *Hammond v. The People*, 32 Ill. 446.

(a) It was formerly held, that the sheriff cannot justify the arrest of the real defendant or the taking of his goods, where his name is mistaken in the writ. *Shadgett v. Clipson*, 8 E. 328; *Cole v. Hindson*, 6 T. R. 234; *Scandover v. Warne*, 2 Camp. 270.

So it has been held, that, where a defendant is arrested by a wrong Christian name, and the sheriff returns, "I have taken, &c., sued by the name of," &c., he is a trespasser. *Rex v. Sheriff, &c.*, 1 Marsh. 75. Otherwise, if the party has admitted the name to be the true one, previous to the issuing of process. *Price v. Harwood*, 3 Camp. 108.

(b) In New York, it has been held, that a *capias ad respondendum*, in a plea of tres-

pass, generally, without indicating the character of the trespass, will not authorize the sheriff to hold the defendant to bail. *Patterson v. Parker*, 2 Hill, 598.

It is held, that, if a debtor is committed on a writ of execution, where it ought to have been levied on property, his remedy is by an action against the officer; the commitment is not thereby rendered void. *Warner v. Stockwell*, 9 Vt. 9.

(c) An officer is liable for levying an execution upon "an impossible judgment." As where the execution was signed by the magistrate as "trial justice," when no such office existed. *Palmer v. Crosby*, 11 Gray, 46.

The irregularity of an execution, issued after a year from the judgment, will be

in legal form, by a court having jurisdiction, and directing him to arrest a party; though the proceedings of the court in issuing the warrant may have been erroneous.¹ The distinction is taken, that process upon an *erroneous* judgment will justify the party and the officer; upon an *irregular* judgment, the officer only.² (a) Thus the sheriff made a levy on property, to which a claim was inter-

¹ Donahoe v. Shed, 8 Met. 326.

² Philips v. Biron, 1 Strange, 509; Billings v. Russell, 23 Penn. 189.

waived by slight acts of the debtor. *Ellison v. Wilson*, 36 Vt. 60.

A sheriff, executing a *fi. fa.* after notice of the allowance of a writ of error or *superseas*, is liable in trespass, though there has been no further *superseas* of the execution. And notice to the sheriff is notice to his officers, and renders them liable in trespass for proceeding with the execution. *Belshaw v. Marshall*, 4 B. & Ad. 336.

But the notice must be actual and not constructive merely. *Morrison v. Wright*, 7 Port. 67.

But this privilege does not extend to a third person assisting the sheriff; as he acts voluntarily, and therefore does it at his peril. *Ibid.*

(a) Upon this ground, an action does not lie against the sheriff, for the neglect of his deputy in the service of an execution, issued by a justice of the peace in the plaintiff's favor, upon a recognizance taken in pursuance of the statute of Massachusetts, of 1782, c. 21, by which the plaintiff lost his debt; where the execution misrecited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it. *Albee v. Ward*, 8 Mass. 79.

In an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. *Guptail v. Teft*, 16 Ill. 365.

An officer cannot seize property without an execution for that purpose; nor the property of third persons. *Yarborough v. Harper*, 25 Miss. 112.

Process cannot lawfully be served after the return day. And where an officer takes property on an execution which has expired, the defendants may retake it, if they can do so without a breach of the peace. *Finn v. Commonwealth*, 6 Barr, 460; *Lofland v. Jefferson*, 4 Harring. 303.

A writ of attachment, not returned to court, constitutes, after the time limited by law for its return, no justification of an officer, who has attached and removed property under it. By the omission of such return, the officer becomes a tres-

passer *ab initio*. And the duty of the officer to make such return, and its necessity to his justification, are the same, although he discovers, after the attachment, that the writ was issued and placed in his hands for service without authority from the plaintiff, who repudiates the proceeding, and although he immediately on such discovery returns the property to the owner. And the officer, in such circumstances, is liable for the actual damage caused by the trespass. It is the duty of an officer, in such circumstances, on discovering that the writ was issued without authority, to restore the property to the owner, and make a true return of the facts. *Williams v. Ives*, 25 Conn. 568. See *Frellsen v. Anderson*, 14 La. Ann. 65.

A debtor may maintain an action against the officer for the property levied upon, after payment of the judgment. *Dorman v. Kane*, 5 Allen, 38.

In such case, a sale on the execution is void. *Laval v. Rowley*, 17 Ind. 86.

A writ or civil process does not, of itself, authorize the officer to execute it on Sunday, or on the fourth day of July; and if executed on either of those days, the return of the officer must show, that the affidavit required by the statute was made and delivered to him. *Swinney v. Johnson*, 18 Ark. 534.

A delivery of possession under a writ of *hab. fac.* furnishes no justification to a previous invasion of the land. *Smith v. Guild*, 34 Me. 443.

A constable, having a warrant to search for certain specific goods, alleged to have been stolen, found and took away those goods, and certain others, also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge. Held, he was liable to an action of trespass. *Crozier v. Cundey*, 6 B. & C. 232.

When a sheriff is sued in trespass, he must prove that he was sheriff. And if written authority is given by the sheriff to make a levy, testimony should be introduced to prove such special authority. *Calvert v. Stone*, 10 B. Monr. 152.

posed, and upon the trial the plaintiff in execution was nonsuited, and the property directed to be restored to the claimant; which judgment was afterwards reversed by the Supreme Court, and the sheriff was afterwards proceeded against by motion for failing to make the money. Held, that he was protected by the judgment of the court, though erroneous, in delivering up the property.¹ More especially, where a precept is lawful on the face of it, and in all its forms, the officer is protected, although it may be voidable for irregularity or mistake;² until set aside or reversed.³ Thus, where process is issued out of one court, with the seal of another attached to it, such process is erroneous, and is the same as if it had no seal; but the defect is amendable; and the process is not absolutely void, but voidable only, and is a good protection to the officer.⁴ So a writ, which has once been legally served, and then altered, by inserting a different date and return day, without the consent of the defendant therein; is not thereby rendered void, so as to excuse the officer, who served it originally, from again making service of it, when delivered to him for that purpose, subsequently to the alteration.⁵ So an execution in the name of "A. B., use of officers of court," is not void, but gives protection to the officer levying it, if issued by a court of competent jurisdiction. The words "use of officers of court" may be treated as surplusage.⁶ So a constable, in trespass for making an attachment, may give in evidence the process on which he made the attachment, notwithstanding the direction of the writ is not in the form prescribed by an existing statute, but is according to a former statute. And such process, if duly returned by him, will justify the taking, though the suit be pending in court at the time of the trial of the action of trespass.⁷

§ 3. In further explanation of the protection or privilege dependent upon *jurisdiction* (see p. 125), it is held, that, where the *subject-matter* of the suit is not within the jurisdiction of a court, all the proceedings are absolutely void, and the officer, as well as the party, is a trespasser. But where the subject-matter is within their jurisdiction, and the want of jurisdiction is as to *person or place*, the officer is excused, unless the want of juris-

¹ Smith v. Leavitts, 10 Ala. 92.

² The State v. McNally, 34 Me. 210; Stewart v. Ray, 4 Ired. 269; Wilton, &c. v. Butler, 34 Me. 431; Parker v. Smith, 1 Gilm. 411.

³ Keniston v. Little, 10 Fost. 318. See Banta v. Reynolds, 3 B. Monr. 80; Cog-

burn v. Spence, 15 Ala. 549; Averett v. Thompson, 15 Ala. 678.

⁴ Dominick v. Eacker, 3 Barb. 17.

⁵ Stoddard v. Tarbell, 20 Vt. 321.

⁶ McElhaney v. Flynn, 23 Ala. 819.

⁷ Stewart v. Martin, 16 Vt. 397.

diction appears on the process.¹ It is said, "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate, acting without any jurisdiction at all, is liable as a trespasser in many cases; but this liability does not extend to the constable who acts under a warrant; and the Statute 24 Geo. II. c. 44, was passed with this very object of protecting such officers."² (a)

§ 4. With regard to the general liability of an officer for the execution of process committed to him, it is held, that for any breach of duty at least nominal damages will be given.³ But it is held that there must be some affirmative evidence of neglect of duty; more especially of the officer's knowledge or means of knowledge of facts, which would have enabled him to make service, had he used due diligence.⁴ Where the evidence as to the exercise of care is evenly balanced, the presumption is that he has done his duty.⁵ Though, it is said, slight evidence will be sufficient to change the burden of proof in this respect;⁶ (b) as where the con-

¹ *Smith v. Shaw*, 12 Johns. 257; *Champaign, &c. v. Smith*, 7 Ohio, N. S. 42.

² *Per Ld. Abinger*, *West v. Smallwood*, 3 M. & W. 420.

³ *Barker v. Green*, 2 Bing. 317. See *Bank v. Waterman*, 26 Conn. 324.

⁴ *Beckford v. Montague*, 2 Esp. 475; *West v. Cooper*, 18 Ind. 1; *Davany v. Koon*, 45 Miss. 71. See *Gregory v. Brooks*, 37 Conn. 365.

⁵ 47 Me. 320.

⁶ 2 Greenl. Ev. § 584.

(a) It was held in an old case, that, in trespass and false imprisonment, for taking a man in execution on a judgment in an inferior court, the plaint and process are sufficient to justify the officer, although there was no cause of action arising within the jurisdiction of the court. *Squibb v. Hole*, 2 Mod. 29; acc. *Higginson v. Martin*, Ib. 195; *Crowder v. Goodwin*, Ib. 58.

(b) In serving a writ, an officer will be presumed to have discharged his duty, and where a party, who resists the officer, relies on the fact, that he omitted to declare the authority under which he acted, it is proper matter of defence, and need not be set forth in the indictment. *State v. Freeman*, 8 Clarke (Iowa), 428.

In an action against an officer for not safely keeping goods attached, instructions to the jury, that, where the officer has taken the goods into his custody, and

has not stated in his return on the execution that they were taken from him without his fault, the burden is on him to show that he exercised ordinary care in keeping them, and he must satisfy the jury that they were lost without his fault; are not sufficiently favorable to him. *Mill v. Gilbreth*, 47 Me. 320.

The more reasonable rule in such a case is, that, if the officer proves the loss of the goods, and the attendant circumstances, the burden of proof is then upon the creditor to show negligence. *Ibid.*

In such a case, theft is not presumptive evidence of a want of ordinary care. *Ibid.*

In an action against the sheriff, for not levying on goods within his bailiwick, and for a false return, it was held, that, though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the dam-

trary is apparent on the record.¹ And in some cases the plaintiff must show, affirmatively, the nature of the claim which it was the object of the process to enforce. Thus, in an action for not serving a writ of mesne process, the plaintiff must prove a cause of action in the former suit.² (a)

¹ Piel v. Brayer, 30 Ind. 332.

² Alexander v. Macauley, 4 T. R. 611;

Riggs v. Thatcher, 1 Greenl. 68; Gunter v. Cleyton, 2 Lev. 85.

ages was what the goods would have realized, if sold for the best price which the sheriff could have obtained. Mullett v. Challis, 2 Eng. L. & Eq. 260.

Where a sheriff is sued for a neglect of duty, it is no defence for him to show that the debtor, even after being imprisoned on a *ca. sa.*, may pay other *bonâ fide* debts, to the disappointment of the judgment creditor. The true inquiry is, has the creditor been deprived of any legal means of recovering his debt; and, if he has, the sheriff is liable for such neglect. Sherrill v. Shurford, 10 Ired. 200.

In an action against a sheriff, to try title to goods alleged to be wrongfully attached by him, an instruction, that, if the defendant levied on the property and held it by virtue of his office, as sheriff, the verdict must be for the defendant, was held erroneous, under any conceivable state of facts. Miller v. Bryan, 3 Clarke (Iowa), 58.

A declaration against the sheriff alleged, that, although the defendant could have levied of goods of the debtor within his bailiwick the moneys indorsed on the writ, yet the defendant, disregarding his duty, did not levy of the said goods the moneys or any part thereof; and that the defendant, further disregarding his duty, falsely returned, &c. Held, the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. Mullett v. Challis, 2 Eng. L. & Eq. 260.

A sheriff, who neglects to sell property under a *fi. fa.*, before the return day of the writ, is *primâ facie* liable for so much of the debt as equals in value the property levied upon. But, if the *fi. fa.* be placed in the sheriff's hands without the *bonâ fide* intention of selling the property; or if the plaintiff, after the levy has been made, enter into negotiation with the defendant, whereby the proceedings are interrupted and the debt lost: the sheriff is not liable. Dorrance v. The Commonwealth, 13 Penn. 160. (See § 4 a.)

In an action against a sheriff for refusing to levy on a particular lot of land, a

plea that the land was subject to mortgage, and therefore the levy would be valueless, is insufficient. Lawson v. The State, 5 Eng. 28.

In determining the sufficiency of a levy, the sheriff must exercise his own discretion and judgment, and, if he fails to levy on what a reasonable man would deem sufficient, if within his power, he will be liable to the plaintiff in execution for the deficiency, as he will to the defendant for an unreasonable excess. But, if the levy be originally sufficient, he will not be liable in case of a deficiency or excess, by reason of depreciation or advance in the value of the property. Ibid. (See chap. 30.)

(a) What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact. Whitsett v. Slater, 23 Ala. 626. See Hearn v. Parker, 7 Jones, 150 (where a delay of eight days was held to make the officer liable); Jenkins v. Troutman, 7 Jones, 169; Whitney v. Butterfield, 13 Cal. 335.

A sheriff, on receiving a *fi. fa.*, is bound to levy on property sufficient to satisfy it, without delay. Lawson v. The State, 5 Eng. 28.

If the sheriff lets the property levied on go out of his hands, not in due course of law, he is responsible if the debt be lost. Sanford v. Boring, 12 Cal. 539.

Where a statute requires all instructions to the sheriff to be in writing, a verbal order from the plaintiff will not discharge him. Ibid.

When the sheriff is ruled for failing to make the money on an execution, evidence that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession until after the return day of the execution," is admissible evidence for the plaintiff. Whitsett v. Slater, 23 Ala. 626.

A sheriff is not liable for failing to make the money on an execution, if the defendant, during the time the execution was in the sheriff's hands, had no property in his possession, unless it be shown that he was the owner of property which

§ 4 *a*. And the general rule (see chap. 4) applies to this class of cases, that an action will not lie in favor of a plaintiff who has been himself in fault. (See § 4.) It is held that a sheriff will not be amerced, where the interference of the plaintiff has prevented him from discharging his duty.¹ Thus a sheriff is not liable for an insufficient return, if attributable to the plaintiff's instruction or interference, or a statement of facts made to the sheriff by the agent of the plaintiff.² So a plaintiff who was present at an execution sale, and did not object to the publicly stated terms of it, cannot, in the absence of fraud or collusion on the part of the sheriff, have a rule against the sheriff, because he announced improper terms of sale.³ So where a plaintiff makes a mistake in the amount of his claim, in his petition, affidavit, and writ, and the sheriff who makes the attachment releases the property on the defendant's paying to him the amount in the writ, and costs; though the plaintiff afterwards recover judgment for a larger amount, he has no cause of action against the officer.⁴ So in an action by the defendant in an execution against the sheriff, for not having entered a sale of his land in the sheriff's books to A, which sale A refused to comply with, so that a resale was made at a less price to B; the sheriff may show in defence, that the price bid by A was in consequence of the fraudulent misrepresentations of the execution defendant respecting his title.⁵

§ 4 *b*. But an officer is held liable for wilful neglect, though there were contributory negligence, and no want of good faith or malice on his part.⁶ And the mere appointment of a deputy, on the nomination of the creditor, to execute a *fi. fa.*, does not discharge the

¹ Stryker *v.* Merseles, 4 Zab. 542. See Lick *v.* Madden, 36 Cal. 208; Koger *v.* Donnell, 1 Head, 377.

² Billingsly *v.* Rankin, 2 Swan, 82; Robinson *v.* Harrison, 7 Humph. 189.

³ Bottoms *v.* Mithvin, 26 Geo. 481. *

⁴ Page *v.* Belt, 17 Mis. 263.

⁵ Ford *v.* Godbold, 2 Strobb. 109.

⁶ Strickfaden *v.* Zipprick, 49 Ill. 286.

could have been levied on, and of which the sheriff had notice; but if the defendant during such time was in the possession of property, and the sheriff, without resorting to the steps necessary to protect himself from liability, returns the execution unsatisfied, he assumes the burden of showing that the property was not subject to the execution, and, unless he does so, must be held liable to the plaintiff. The Governor *v.* Campbell, 17 Ala. 566.

Where a sheriff had levied on the property of a defendant in execution, and neglected to advertise and sell it for

nearly six months, not having time to do so before the next term of the court; and, just before the sitting of the court, an injunction was obtained by the defendant, restraining the plaintiff from collecting his *fi. fa.*: held, the sheriff was liable notwithstanding the injunction. Neal *v.* Price, 11 Geo. 297.

Where a sheriff had charge of a slave arrested on warrant for larceny, and, through want of ordinary and honest diligence on his part, such slave met with injury or death, the sheriff would be liable for the injury to the master. Tudor *v.* Lewis, 3 Met. (Ky.) 378.

sheriff from liability for the wrongful act of the deputy (as in failing to levy and sell under an execution), unless there be collusion or want of good faith in making the nomination.¹ And where an execution creditor instructs a deputy sheriff to sell on credit, but he does not act in conformity with the instruction, this does not make such deputy the agent of the creditor, so as to discharge the sheriff from liability to such creditor for the wrongful acts of the deputy, in other particulars, in reference to the sale.² So where on the plaintiff's *fi. fa.* was indorsed a stay of "sales only," and the plaintiff's attorney informed the sheriff that the stay was intended to apply only to the sale, and instructed him to levy immediately; held, the sheriff was liable to the plaintiff for neglecting to levy.³ So an agreement by the creditor with the officer to postpone an execution sale, after levy of an execution issued by a justice of the peace, does not absolve an officer from his duty to return the execution.⁴ So a release by the plaintiff of his own property, or property claimed by a third person, taken with property of the defendant on an execution, does not discharge the sheriff's liability for not making money from the defendant's property.⁵ Nor is it a defence to an action against a sheriff, for not levying and returning an execution, that it had been agreed between the plaintiff and the debtor, that the balance due upon the execution should be charged to the debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies; without evidence that the amount had been actually paid or adjusted, by a settlement of the current account embracing it.⁶ So an omission, by a party for whom the sheriff is acting, to interfere with him in the discharge of his duties, or to object to or complain of the manner in which he performs them, is held no such evidence of assent to his neglect or violation of duty, as can properly be submitted to the jury.⁷ So where property had been attached, judgment obtained, and execution issued, and placed in the hands of an officer for service; and, upon the officer's suggesting a doubt whether the property belonged to the debtor, the creditor directed him to inquire before levying, and afterwards the creditor gave to the officer a sufficient bond of indemnity, and directed him to sell the property, and also

¹ *Martin v. Martin*, 2 Jones, 285.

² *Sheldon v. Payne*, 3 Seld. 453.

³ *Farrar v. Wingate*, 4 Rich. 35.

⁴ *Clingman v. Barrett*, 6 Humph. 20.

⁵ *Poe v. Dorrah*, 20 Ala. 288.

⁶ *Nye v. Kellam*, 19 Vt. 548.

⁷ *Moore v. Westervelt*, 2 Duer, 59.
See *Ib.* 21 N. Y. 103.

to levy upon another article of property, which had not been attached: held, this afforded no evidence that the creditor had controlled the execution, so as to exonerate the officer from liability for neglecting to levy it.¹ So in an action against an officer for not making and paying over the money upon an attachment; it is no defence that the attachment was collusive and fraudulent against creditors.² So a sheriff who makes an unauthorized conversion of intoxicating liquors is a trespasser, though such liquors are intended for illegal sale.³ So the owner of goods exempt from execution, who has subjected them to a mortgage payable on demand, by the terms of which he remains in possession until default, can maintain an action against the sheriff who seizes them under a *fi. fa.* in favor of another creditor. And, as between the plaintiff and the sheriff, the property will be treated at its full value.⁴ (a)

§ 5. With regard to the further justification of an officer in the service of process, depending upon the *liability* of the party, or the property of the party, upon whom such service is made; it is the general rule, that, if an officer, in the execution of process, goes beyond its mandate, and takes property from the possession of a stranger, he can only defend himself by showing a better title in himself, or in him for whom he acts.⁵ No previous demand is necessary to maintain an action for wrongfully taking personal property.⁶ Nor will any title pass to goods of A, sold on an execution against B.⁷ And trespass may be maintained against a sheriff, by a party whose goods he has seized in an attachment against another, for the illegal taking and detention; although in the attachment case he had come in, and filed his claim to the property, and recovered judgment for its restitution.⁸ A writ of

¹ Chase v. Plymouth, 20 Vt. 469.

² Seaver v. Pierce, 42 Vt. 325.

³ Hamilton v. Goding, 55 Me. 419.

⁴ Livor v. Orser, 5 Duer, 501.

⁵ Perkins v. Thornburgh, 10 Cal. 189; Lyon v. Goree, 15 Ala. 360; Crosby v.

Baker, 6 Allen, 295. See Barry v. M'Grade, 14 Minn. 163.

⁶ Wellman v. English, 38 Cal. 583.

⁷ Chambers v. Lewis, 28 N. Y. (1 Tiffa.) 454; Harris v. Murray, Ib. 574.

⁸ Trieber v. Blocher, 10 Md. 14.

(a) An officer may also, by his own act, preclude himself from setting up a defence which under other circumstances might be made. Thus, where payment of the amount collected by a deputy on an execution is demanded of the deputy by an agent of the creditor, and he promises to pay the amount at a future time; in an action against the sheriff for the money, it cannot be objected, that no

evidence was shown of the authority of the agent. Barron v. Pettes, 18 Vt. 385.

So where a statute requires a sheriff, on going out of office, to turn over processes in his hands to his successor by indenture and schedule; if such successor or his deputy receive them without this formality, he is liable for their proper execution. Matthis v. Pollard, 3 Kelly, 1.

the United States Circuit Court does not protect the marshal in levying on property of a third party.¹ But the distinction is made, even in regard to property of the execution debtor himself, that an *officer* may justify the seizure of property by alleging and showing a *fi. fa.* from the proper tribunal, but the *plaintiff* in such execution must show the judgment on which it issued.² (a) So where a plaintiff claims under a previous purchase from the defendant in the execution, the officer may show that such purchase was fraudulent as to creditors, and, in so doing, may, and is in general required to show the judgment under which the execution was issued.³ But an officer is not bound to take the money of a third person, though offered by the debtor.⁴ And he may justify neglect to serve an execution, by showing title in a third person;⁵ or that the judgment is fraudulent, and that he holds another process in favor of another judgment creditor.⁶ (b) Or that goods

¹ Weber v. Henry, 16 Mich. 399.

² Clay v. Caperton, 1 Monr. 10; Dixon v. Watkins, 4 Eng. 139; Burton v. Sweaney, 4 Mis. 1. See Dobbs v. Justices, &c., 17 Geo. 624.

³ Rinchey v. Stryker, 31 N. Y. (4 Tiff.) 648; Stephens v. Frazier, 2 B. Monr. 250. See High v. Wilson, 2 Johns.

46; Paige v. O'Neal, 12 Cal. 483; Frisbee v. Langworthy, 11 Wis. 375.

⁴ Carey v. Tinsley, 22 Tex. 383.

⁵ Dobbs v. Justices, &c., 17 Geo. 624.

⁶ Pierce v. Jackson, 6 Mass. 242; Clark v. Foxcroft, 6 Greenl. 296. See Adams v. Balch, 5 Greenl. 188; Wilson v. Sparks, 9 Tex. 621.

(a) But a party who seeks to justify the taking of property, under legal process, must show that he was an officer, and had lawful authority to take the property. Thus, in an action of trespass, the proof was, that the defendant admitted that he had levied on the property, at the same time exhibiting the execution and stating whom it was against; and, when asked whether he would disclaim the levy, he refused to do so. Held, sufficient to charge him as a trespasser, and that the admission involved no justification under the process. Copley v. Rose, 2 Comst. 115.

So declarations of a defendant, in an action of trespass for the removal of personal property, made during the removal, that he was acting under an execution against the owner, are no proof of that fact. To make such execution a justification, it must be set up in the pleadings and legally proved at the trial. Schultz v. Frank, 1 Wis. 352.

So, in an action of trespass, the plaintiff called one of the defendants, who testified to the taking, and that it was done by virtue of a road-warrant. Held, that this statement made no justification, for it did not show that the warrant was in due and legal form, but the warrant itself

should have been produced. Mericle v. Mulks, 1 Wis. 366.

So a justification in trespass, under a judgment and execution of A, a justice, requires proof that A is a justice. Hunter v. Harris, 4 Blackf. 126.

But the officer is not required to show a sale of the property taken. Burton v. Sweaney, 4 Mis. 1.

When an execution comes to the hands of a sheriff after the expiration of his term of office, if he levies on and sells the defendant's property by virtue of it, he is liable in trover or trespass. So although the defendant, not knowing that fact, being present at the sale, did not ask a postponement. Andress v. Broughton, 21 Ala. 200.

So a constable cannot levy upon property after the return day of the writ; and, if he does so, he is a trespasser. But if a levy has been duly made before, the property may be taken away after, the return day. West v. Shockley, 4 Harring. 287.

(b) If the sheriff sets up the defence that the goods in his hands were applied to a prior execution, the plaintiff may show that such execution was fraudulent, and the sheriff notified not to pay over the money to the creditor therein. War-

to be attached did not belong to the debtor.¹ Or prior attachments, sufficient to cover the whole value of the goods.² So, in case of insolvency, goods attached, but previously mortgaged, must be delivered to the mortgagee, not the assignee.³ But where a sheriff, sued for seizing the property of A, justifies by alleging that he seized it on process in favor of B, as the property of C, he is bound to prove the indebtedness of C to B, and that the proceedings were instituted by him, and were correct.⁴

§ 6. A constable, who has taken property out of his precinct, by virtue of mesne process, and who is sued in trespass for such taking, may show, in mitigation of damages, that, having taken the property to a place within his precinct, he attached it there, on the same process, as the property of the same debtor, subsequent to the commencement of the action of trespass against him.⁵

§ 7. Where the owner of chattels suffers them to be mixed with those of another person, so that they cannot be distinguished, an officer will not be liable to an action of trespass (nor, it seems, to any action), for attaching them as the property of the latter. But if, after the attachment, such owner points out his goods to the officer, and demands a redelivery of them, and the officer notwithstanding sells them, the sale will be a conversion.⁶

§ 8. If an officer would take goods belonging to A, and in A's possession, upon a writ against B, A may maintain his possession by force, in the same manner as he might against any other trespasser.⁷

§ 9. Upon the general ground of *possession* (see chap. 18), as sufficient to maintain an action for tort, a sheriff may maintain either trover or trespass, for goods taken out of his hands, after seizure by virtue of a *feri facias*; for he has a special property in them.

¹ Canada v. Southwick, 16 Pick. 556.

² Commercial Bank v. Wilkins, 9 Greenl. 28. See Jordan v. Gallup, 16 Conn. 536.

³ Howe v. Bartlett, 8 Allen, 20.

⁴ Cross v. Phelps, 16 Barb. 502; Sanford, &c. v. Wiggin, 14 N. H. 441.

⁵ Stewart v. Martin, 16 Vt. 397.

⁶ Shumway v. Rutter, 8 Pick. 443.

⁷ Commonwealth v. Kennard, 8 Pick. 133. See State v. Downer, 3 Vt. 424; Faris v. State, 3 Ohio St. 159; State v. Miller, 12 Vt. 437; — v. Fifield, 18 N. H. 34.

moll v. Young, 5 B. & C. 660. And the same answer may be made to the defence of a transfer by the debtor himself. Dewey v. Sir A. Bayntun, 6 E. 257.

The rule which requires an officer levying on property, in justifying against strangers, to show a valid judgment, as well as execution, does not apply, where voluntary assignees of the defendant in

execution, who became such after the levy, are the claimants. In such case, the production of the execution is sufficient. Heath v. Westervelt, 2 Sandf. 110.

Where the debtor was in possession, the owner must make a demand before suit. Killey v. Scannell, 12 Cal. 73.

(See chap. 30.) In trover, it is held, he can recover only the value of the goods; in trespass, damages for the tortious taking.¹ (a) So trover may be maintained by an officer against a debtor, for property which had been owned and possessed by the debtor, and receipted by him to the officer as attached, though it was not actually seized, or even seen, by the officer.² So where a constable levies an execution upon property, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees. And, in New York, if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount.³ And it is no defence, in a suit by an officer, that there may be property enough remaining to satisfy the execution.⁴ So although, if a levy be wantonly excessive, an execution debtor may have his remedy by an action on the case; the officer's right of property is held to be in no way affected by this circumstance.⁵ (b) But a sheriff, in case of a void execution, cannot maintain an action.⁶ And after *teste* of a *fi. fa.*, but before an actual levy, he has not such a property in the goods of the defendant, as will enable him to maintain trover against a person who tortiously takes them away, and converts them to his own use.⁷ Nor can a constable maintain an action against a stranger, for taking away property levied on by him, after he has made a return upon the execution, by which, by order of the plaintiff, he has formally released the levy.⁸ (c) And where property is levied upon by virtue of an

¹ Wilbraham v. Snow, 1 Mod. 30. See Earl v. Camp, 16 Wend. 562; Parker v. David, 45 Miss. 488; Hunt v. Pratt, 7 R. I. 283.

² Pettes v. Marsh, 15 Vt. 454.

³ Seaman v. Luce, 23 Barb. 240.

* Per Gridley, J., Marsh v. White, 3 Barb. 518.

⁵ Dezell v. Odell, 3 Hill, 215. See Martin v. Zellerbach, 38 Cal. 300.

⁶ Rue v. Perry, 63 Barb.; Am. Law Reg., Jan. 1873, p. 53.

⁷ Hotchkiss v. M^r Vickar, 12 Johns. 408.

⁸ Marsh v. White, 3 Barb. 518.

(a) A sheriff of another State may sue to recover sequestered property fraudulently taken out of his possession; and recover the expenses he has been compelled to incur in order to remove it. Newman v. Wilson, 1 La. Ann. 48.

It is held that the possession of personal property by the *deputy* of a sheriff, in virtue of a levy, is the possession of the sheriff; Easley v. Dye, 14 Ala. 158; and that a deputy sheriff cannot bring trover or trespass for goods seized by him on execution, and taken from him by another; though the sheriff may. Hampton v. Brown, 13 Ired. 18; Terwilliger v. Wheeler, 35 Barb. 620.

(b) But the plaintiff in an execution cannot sue a stranger for removing property levied on, where there was enough property left to satisfy the execution, and the plaintiff either released such residue, or lost his lien upon it by his own negligence. Marsh v. White, 3 Barb. 518.

(c) But, in an action of trespass brought by a constable for the taking away of property levied upon by him under an execution, but of which he has taken no actual possession, the action being brought for the benefit of the creditor; the plaintiff must prove a *judgment*, if required to do so. Proving the *execution* alone is

attachment, and subsequently another levy is made upon the same property by virtue of a second attachment, the officer making the second levy is not entitled to maintain an action of trover against a sheriff who illegally takes and sells the property.¹ So in an action of trover brought by an officer who has levied under an execution, against parties engaged in a second levy on the same property, they may show circumstances of fraud to defeat the action, equally as if it had been brought by the creditor himself.²

§ 10. With regard to the forms of proceedings against officers, acting under process of law, it is held, that trespass against the officer is the proper remedy where goods are wrongfully taken under color of legal process; and actual possession of the plaintiff is not necessary, but only a right of possession.³ But for mere neglect or *nonfeasance*, as in other like cases, trespass on the case is the proper remedy. (*a*) It is held that case, for any mere nonfeasance of a deputy, will not lie against the sheriff.⁴

§ 11. The necessity of *notice*, in order to enable an officer to justify under legal process, is sometimes brought in question.

§ 12. In an action for assault and battery, committed on an officer by one whom he was attempting to arrest on a warrant, the defendant set up, by way of rejoinder, that the plaintiff, at the time, &c., did not acquaint or give notice to the defendant that a warrant had been issued, or that he had any warrant, or process, &c., nor did the defendant know that any warrant had been issued, or that the plaintiff had any warrant or process; to which the officer surrejoined, that he did acquaint and give notice to the defendant that a warrant had been issued, &c., concluding to the country. The issue having been found for the defendant, held, not a case for a judgment *non obstante veredicto*, and that he was entitled to judgment, though several other issues were found against him.⁵ (*b*)

¹ *Dubois v. Harcourt*, 20 Wend. 41.

² *Farrington v. Sinclair*, 15 Johns. 428.
See *Martin v. Zellerback*, 38 Cal. 300.

³ *Codman v. Freeman*, 3 Cush. 306.

⁴ *Abbott v. Kimball*, 19 Vt. 551.

⁵ *Bellows v. Shannon*, 2 Hill, 86. See
State v. Phinney, 42 Me. 384.

not sufficient. *Pyne v. Westfall*, 3 Barb. 496.

(*a*) See *Trespass, Case*. Case can be brought for an arrest on void process, such as process issuing out of a court without jurisdiction, only where malice and falsehood are the gravamen of the offence, and the false imprisonment is only an incident. For false imprisonment, trespass is the remedy. *Platt v. Niles*, 1 Edm. (N. Y.) Sel. Cas. 230.

If the real ownership of a judgment and execution is in a different party from the creditor of record, and the officer neglects to pay over the money collected; the action against him may be brought in the name of either; and, generally, the rule of damages is the same in either case. *Bradley v. Chamberlain*, 31 Vt. 468.

(*b*) An indictment, for assaulting and obstructing an officer in the discharge of

§ 13. But it has been sometimes held, that the officer, having authority, need not at the time claim to act under his precept or any other authority.¹ (a) Thus, in trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, though he declared then that he entered for another cause.² So if an officer has a lawful process authorizing him to seize property, he is not a trespasser, though he professes to act under another process which did not justify him.³ So where a defendant was in prison under an invalid process, and the sheriff, without telling his deputy, the jailer, that he had in his own hands a valid process, ordered him to retain the prisoner; held, in an action for false imprisonment, that the possession of a valid process by the sheriff was a good defence for the acts of his deputy, though the latter was ignorant of the fact.⁴ But, in trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *feri facias*, to which the plaintiff replied *de injuriâ suâ propriâ absque residuo causæ*, and newly assigned, that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea. Held, that it was competent to the judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the writ, or whether the execution was resorted to as a color for taking them, and not to effect a levy by virtue of the writ.⁵

§ 14. Questions often arise, involving the duty and liability of officers in relation to the *return* of legal process. (b)

¹ State v. Elrod, 6 Ired. 250.

² Crowther v. Ramsbottom, 7 T. R. 654.

³ Parish v. Wilhelm, 63 N. C. 50.

⁴ Meeds v. Carver, 8 Ired. 298.

⁵ Lucas v. Nockells, 1 Moo. & P. 783.

his duties, as such, averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly" hinder and oppose him, &c. Held, a sufficient allegation, that the defendant knew that he was an officer. Commonwealth v. Kirby, 2 Cush. 577.

Also, if it were otherwise, that this is not a ground for arresting the judgment, but only for sentencing the defendant for the simple assault. Ibid.; 42 Me. 384.

(a) With regard to a claim against an officer for positive wrong or malice in connection with an official act: if a surety in a debtor's bond, before the condition had expired, applied to the officer

for information as to its date, and the officer stated to him a time later than its true one; the surety cannot maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive. Moulton v. Jose, 25 Me. 76.

But, in an action against the sheriff for causing, by his wrongful representations, property seized by him under legal process to be sold for less than its value, it is not necessary to aver that the representations were made *maliciously*. An averment that they were made falsely and fraudulently is sufficient. Griffin v. Isbell, 17 Ala. 184.

(b) See Hutchins v. Carver, 16 Minn. 13; Muzzy v. Howard, 42 Vt. 23; Wa-

§ 15. It is held in an old case, that a justification under a returnable process is ill, without showing a return of it. And, if the plaintiff in the action join with the officer in the plea, there must be judgment against both.¹ (a) The distinction is made,

¹ Middleton v. Price, 2 Stra. 1184; Henry v. Tilson, 19 Vt. 447. See Walker v. Davis, 3 H. & N. 374; State v. Latham, 6 Jones, 233; Polley v. Lenox, &c.,

4 Allen, 329; Funk v. Hough, 29 Ill. 145; Miller v. Mills, Ib. 431; Smith v. Tooke, 20 Tex. 750; Foster v. Dryfus, 16 Ind. 158.

terman v. Merrill, 33 N. J. L. 378; Sanford v. Pond, 37 Conn. 588; Bell v. Thorpe, 44 Geo. 509.

In regard to the mode of *proving* a return or the want of it, it is held, that the question whether a writ of attachment was ever returned, being a fact which cannot be determined by inspection of the record, is a question for the jury. Parks v. Hall, 2 Pick. 206; Hinman v. Brees, 13 Johns. 529.

(a) A sheriff is not liable to an action merely for omitting to return an execution till after the return day. Commonwealth v. Magee, 8 Barr, 240.

It is not the duty of a sheriff to return process to any one but the clerk or his deputies. Casky v. Haviland, 13 Ala. 314.

A sheriff has no power to execute or return an execution after his term of office is at an end, unless he began while in office to execute it; and a failure to execute and return an execution in such a case is not a breach of his bond, so as to charge his sureties. So with neglect to deliver over process unexecuted to his successor. State v. Parchman, 3 Head, 609.

But it is not a defence to a suit against an officer for neglecting to return a process to the proper term of the court, that he had tendered it to the clerk, who had refused to receive it; nor that the clerk had died during the term. Hamlin v. March, 9 Ired. 35.

Although, if a sheriff makes a false return on a writ, the party injured has his remedy by suit; the sheriff cannot be compelled to amend his return, and return a particular state of facts. Humphries v. Lawson, 2 Eng. 341.

Where executions are by law returnable to the term next their issuing, unless the plaintiff otherwise order; if by mistake one is made returnable to a day in vacation later than the next succeeding term, the officer is yet bound to make return to such term; and, for failure to make such return, he is liable for the full amount of the debt. Milburn v. The State, 11 Mis. 188.

In an action against a sheriff for a false

return upon a writ of replevin; if the defendant do not plead the general issue, nor any special plea denying that the original suit was well founded; it is admitted to have been so. The State v. Youmans, 1 Cart. 217.

But, in an action against a sheriff for a false return upon a *fi. fa.*, the plaintiff must show that the judgment upon which it issued was a valid one. McDonald v. Bunn, 3 Denio, 45.

In an action against a sheriff for neglecting to return a *fi. fa.*, where there is no averment that the debtor had real estate, and there is evidence that there was not sufficient personal property, it is held that the plaintiff cannot show that the debtor had real estate. Stevens v. Rowe, 3 Denio, 327. See Ledyard v. Jones, 7 N. Y. 550.

A sheriff may defend a motion against him for failing to make due return of an execution, by proving that the execution was not supported by a judgment. But it will not avail him to show that the execution was returned the day after the day appointed, and quashed for some defect in itself alone. Shute v. McRae, 9 Ala. 931.

A sheriff cannot justify an attachment under a writ which it was his duty to return, without showing such return, although it was not returnable before this action was commenced. Williams v. Babbitt, 14 Gray, 141.

A mistake of a date in a return may be corrected at any time. Ritter v. Scanell, 11 Cal. 238. See Bixby v. Rowe, 2 Mich. N. P. 152; Johnson v. Stone, 40 N. H. 197; Conkling v. Parker, 10 Ohio, N. S. 28; Farmington v. Somersworth, 44 N. H. 589; Watter v. Palmer, 18 Ind. 279.

In Tennessee, motion, and not the notice that it will be made, is the commencement of suit; and the sheriff may amend his return upon a summons at any time before motion, even after service of notice. Hill v. Hinton, 2 Head, 124.

Where the sheriff levies on property under an attachment, but omits to make a return of the levy, he may afterwards be permitted to make the return *nunc pro*

however, that, in order to justify under *final process*, the sheriff is not required to show its return. Otherwise, in case of *mesne process*, which is merely the foundation of further proceedings.¹ But a *bailiff* may justify under a process, without showing a return; he not having the control of the process. So the *party* in whose favor it issued; except where he joins with the sheriff in a plea of justification.²

§ 16. An officer is liable for a *false return*; and this whether it be positively or negatively false. Thus an action on the case will lie, for suppressing material facts in the return to a *mandamus*.³ So for a return false in substance, though true in words.⁴ Or though made false through ignorance or mistake.⁵ But not where the return is not false in fact, but only draws an incorrect legal inference from facts which are truly stated.⁶ So an action lies, although, after the return of *nulla bona*, the creditor brought another action and recovered a new judgment.⁷ (a)

¹ Rowland v. Veale, 1 Cowp. 18; Freeman v. Blewitt, 1 Salk. 410; Brown v. Bissett, 1 Zabr. 46; Hoe's case, 5 Co. 90; Doillie v. Joiliffe, Lane, 50; Cheasley v. Barnes, 10 E. 73; Britton v. Cole, 1 Salk. 408; Oystead v. Shed, 12 Mass. 511. See Neil v. Beaumont, 3 Head, 556; Parker v. Pattee, 4 N. H. 530.

² 2 Phill. Ev. (4th Am. ed.) 366.

³ The King v. Lyme Regis, 1 Doug. 158, 159.

⁴ Ibid.

⁵ Houser v. Hampton, 7 Ired. 333; Clark v. Gary, 11 Ala. 98.

⁶ Lemit v. Mooring, 8 Ired. 312.

⁷ Pitcher v. King, 9 Ad. & Ell. 288.

tunc; and, upon such return being made, the rights of the attaching creditor will be the same as if it had been made at the proper time. Bancroft v. Sinclair, 12 Rich. 617.

The return of a sheriff, upon an attachment, cannot be amended by him after his term of office has expired. Cole v. Dugger, 41 Miss. 557.

As to the unauthorized erasure of a return, see James v. Gurley, 48 N. Y. 163.

The return upon process served on the officer of a corporation need not designate this office. And the omission is cured by judgment. Crawford v. Bank, Phill. N. C. L. 136.

A return upon a writ of *habere facias*, stating that the officer appointed two appraisers, the debtor "having been duly notified and neglected to choose an appraiser," need not specify which of the two was appointed to act for the debtor, and sufficiently shows that reasonable time was given to the debtor to select an appraiser. Ufford v. Dickinson, 12 Allen, 543.

A return by the officer that he "cannot find corporate property," &c., is sufficient under § 18, c. 76, (Me.) Rev. Sts. of 1841. And a certificate, that he "made

diligent search" before his return, is a sufficient compliance with the provision that he must "first ascertain." Hathorn v. Calef, 53 Me. 471.

(a) It is held, in an old case, that an action on the case will not lie against a sheriff, for returning *cepi corpus et paratum habeo*, although the party arrested do not appear. Page v. Tulse, 2 Mod. 83.

No action lies against the sheriff, for a false return of *nulla bona* by his bailiff, to a writ of *fi. fa.* issued out of his county court, although the defendant had notice of the goods, and the return was made with his privity and by his direction. Pitcher v. King, 9 Ad. & Ell. 288.

By a false return, the officer may not only subject himself to an action, but also preclude himself from maintaining an action in reference to property seized by him. Thus an officer, who had taken property on an execution, untruly returned, that further service was suspended on account of a former attachment. He afterwards took a receipt for the property, to be redelivered on demand, or within thirty days from the rendition of judgment in the first suit. Held, that no action could be maintained on this receipt. Stanley v. Drinkwater, 43 Me. 468.

§ 17. It is held that an officer is liable to an action, for neglecting to return an execution according to the precept thereof, although the judgment creditor suffers no injury by such neglect.¹ And, in an action against a sheriff, for not returning an execution, where the defendant had real estate within his precinct, the measure of damages is the amount of the judgment, with interest.² So if a sheriff, having final process in his hands against the body of a debtor, has an opportunity to arrest him, and neglects to do so, and afterwards, within the life of the execution, the debtor absconds, and the sheriff thereupon makes a return of *non est inventus* upon the execution; he is liable for the amount of the execution and interest, though the debtor was insolvent.³

§ 17 *a*. But an officer is not liable to a judgment by motion for non-return of an execution, if within the time given by law for its return his term of office expires.⁴ And it has been held, that, in an action for false return, the defendant may offer evidence of the real damage thereby caused to the plaintiff. And no action is maintainable, without averment of special damage, against the sheriff, for a false return to a writ of *fi. fa.*, where, necessarily, no damage could result to the creditor; the goods in question having vested in the assignees of the debtor, who had become bankrupt.⁵ So, in regard to the *mode* of return, the sheriff may return an execution *by mail*.⁶ And to an action for failing to return an execution within thirty days from return-day, it is a good defence that he has lost or mislaid it, or has mailed it to the office whence it issued; and that, after diligent search, he cannot find it; though this must be proved by evidence, like any other matter in avoidance.⁷ So where a sheriff misplaced an execution, and failed to return it within thirty days after return-day; but it was replevied by good parties: in an action against the sheriff, he was held not to be liable.⁸ So it is a good defence to an action for failing to return an execution, that the levy or the judgment was fraudulent and void; provided, in the latter case, the sheriff hold the process of another creditor against the judgment debtor.⁹ So it is a good defence to an action for false return, that the plaintiff, with full notice of the facts, assented to such return.¹⁰ So, a justice of the peace issued a notification,

¹ Goodnow v. Willard, 5 Met. 517.

² The People v. Lott, 21 Barb. 130.

³ Goodrich v. Starr, 18 Vt. 227.

⁴ Neil v. Beaumont, 3 Head, 556.

⁵ Wylie v. Birch, 3 Gale & Dav. 629;
acc. Nash v. Whitney, 39 Me. 341.

⁶ Cockerham v. Baker, 7 Jones, 288.

⁷ Mitcheson v. Foster, 3 Met. (Ky.) 324.

⁸ Shippen v. Curry, 3 Met. (Ky.) 184.

⁹ Bradley v. Wyndham, 1 Wils. 44;

Clark v. Foxcroft, 6 Greenl. 296.

¹⁰ Stuart v. Whittaker, 2 C. & P. 100.
See Beynon v. Garrat, 1 Ib. 154; Holmes

that a debtor committed on execution intended to take the poor debtor's oath at a certain time, and an officer returned, that he had served a copy on the creditor, whereas, by the supposed copy, a different time was fixed. At the time appointed in the original notification, the debtor took the oath, in the absence of the creditor, and was discharged. In an action by the creditor against the officer for a false return; held, the officer might give in evidence, in mitigation of damages, that the debtor had no attachable or visible property; and if this, in connection with the other evidence in the case, should satisfy the jury that the debtor was entitled to take the oath, the plaintiff ought to recover only nominal damages.¹ So, where a summons was issued from a justice's court against A, which the constable, by mistake, served upon B, and returned the summons *personally served*, and judgment was rendered against A, for a penalty alleged to have been incurred by a violation of a statute; in an action brought by A against the constable for a false return, the defendant may show in mitigation of damages, that A had actually been guilty of the offence for which judgment was rendered against him; for, as the defendant acted in good faith, the plaintiff ought not to recover more than his actual damages, and having alleged, in his declaration, that by the false return he was prevented from making a defence, when he had a good and substantial one on the merits, the evidence in question is a proper answer to this averment.² And a sheriff is not liable for an insufficient return, if attributable to a statement made to him by the agent of the plaintiff.³ Nor for a mere false expression of opinion as to his return. Thus a deputy sheriff, who had returned a *fi. fa.*, was inquired of, some months afterward, by the plaintiff, whether the return was in due form of law, and the deputy, intending to deceive, answered that it was; whereupon the plaintiff filed a creditor's bill against the execution defendant, but lost the advantage thereof by insufficiency of the return. Held, an action for deceit would not lie against the deputy, inasmuch as the inquiry made of him related merely to his opinion upon a question of law; and, even if the inquiry had been specifically directed to the words of the return, and the deputy had answered falsely, the action could not have been maintained; for the plaintiff had the means of attaining correct information

v. Clifton, 10 Ad. & Ell. 673; *Smallcomb v. Cross*, 1 Ld. Raym. 251.

¹ *Woods v. Varnum*, 21 Pick. 165.

² *Green v. Ferguson*, 14 Johns. 389.

³ *2 Swan*, 82.

completely within his reach, without resorting to the deputy.¹ (a) So, where neither the body nor property of a debtor is within the reach of a sheriff holding an execution, and he neglects to return the execution to the proper office within its life, with his return of *non est inventus*; he is liable to the creditor only for actual damages.²

§ 18. In general, a return must be true *at the time*.³ But a return is not false, although the act returned was not fully completed at the time at which it is stated to have been done. Thus an execution was delivered to an officer, with directions to levy it on real estate; and the officer, without entering on the land, immediately made a memorandum on a separate paper (noting the day and hour) that he then took the land in execution. He afterwards caused the land to be set off, and dated his return as of the above day and hour. Held, the return was not false, and the levy took effect, by relation, from that time.⁴ (b)

§ 19. A party to the suit cannot controvert the truth of a sheriff's return, if regular upon its face. The remedy for the party injured is an action for a false return.⁵ Nor can a return be contradicted as against third persons who have acquired rights under a judgment.⁶ And the return of an officer, while, as between third persons, (c) conclusive evidence of the facts stated in it, is

¹ Per Bronson, J., *Starr v. Bennett*, 5 Hill, 303.

² *Kidder v. Barker*, 18 Vt. 454.

³ *Bowen v. Parkhurst*, 24 Ill. 257.

⁴ *Hall v. Crocker*, 3 Met. 245.

⁵ *Stewart v. Stringer*, 41 Mo. 400.

⁶ *Rivard v. Gardner*, 39 Ill. 125.

(a) But an officer, who has under a writ of replevin entered on land and taken property, in order to justify, must make his return on such writ; and, if he does not return, and the plaintiff is instrumental in preventing such return, the plaintiff cannot justify under it, unless the defendant assented thereto. This rule does not apply, however, to those who acted by the authority of the officer under the writ. *Allen v. Feland*, 10 B. Monr. 306.

It is held that the punishment imposed on a sheriff, under the (Texas) statutes, for not returning a writ, is for a contempt of court, if his misconduct amounts to a contempt, and in all cases he is liable for damages resulting from his non-performance. *Crow v. State*, 24 Tex. 12. See *Randolph v. State*, 9 Tex. 521.

A failure to return a process is only *prima facie* a contempt. *Ibid*.

By § 3603 of the (Tennessee) Code, a penalty of \$125 is recoverable by motion of the party aggrieved against any officer who fails to execute and make return of

any process issued from any court of record, and delivered to him twenty days before the return-day. This means that he shall not only hand in the writ, but return that he has executed it, or state a sufficient reason why he has not done so. *Hill v. Hinton*, 2 Head, 124.

The return, "not to be found in my county," would be more perfect and proper, but great strictness is not required when a motion is made for a penalty. Hence the return, "not found," although informal, is sufficient. *Ibid*.

(b) Where a sheriff indorsed truly the day on which he received a declaration in ejectment, returnable to a county court, and returned on the same "too late to hand," although five days intervened between the day indorsed and the return-day; it was held, that he was not liable under (North Carolina) Rev. Code, c. 105, § 17, to the penalty for making a false return. *Hassell v. Latham*, 7 Jones, 465.

(c) The return of a sheriff, that dower had been set forth, on a writ of seisin of

also at least *prima facie* evidence in favor of the officer himself; (a) and, except in an action for false return, has been held not open to contradiction by other evidence. Thus when an officer, in his return of the levy of an execution, states that he delivered to A, the agent of the execution creditor, seisin and possession of the premises levied on; such creditor, in an action against the officer for a defective levy, cannot give evidence that A was not his agent.¹ So where an officer returns on a warrant, directing him to search the buildings of S. for certain described stolen goods, "by virtue of this warrant, having made diligent search, and found three pieces of goods in the house of the within-named S., and arrested the body of the within-named S., and have him," &c.; this return is *prima facie* evidence, at least, that the officer had found three pieces of the goods described, and justifies him in arresting S., and carrying him with the goods before a magistrate.²

§ 19 a. In general, however, in an action against a sheriff, his return may be contradicted by the plaintiff, even though he were a party to the process on which the return was made.³ Thus where a sheriff defended his return, on the ground that the debtor was servant of an ambassador; it was held that the plaintiff might show the appointment to that office to have been colorable and illegal.⁴ And, on the other hand, where a return of the sheriff, as upon a writ of attachment, fixes on him a liability to the plaintiff, it is not competent for him, in a suit by the latter, founded on such return, to prove that it is incorrect. A direct application for leave to amend the return should be made to the court whence

¹ *Bates v. Willard*, 10 Met. 62. See *Bruce v. Holden*, 21 Pick. 187; *Townsend v. Olin*, 5 Wend. 207; *Gardner v. Hosmer*, 6 Mass. 325; *Shewel v. Fell*, 3 Yea. 17; *Lewis v. Blair*, 1 N. H. 68; *Fuller v. Holden*, 4 Mass. 498; *Castner v. Symonds*, 1 Minn. 427; *Tullis v. Brawley*, 3 Minn. 277; *M'Donald v. Leewright*, 31 Mis. 29; *Folsom v. Carli*, 5 Minn. 333; *Kingsbury v.*

Buchanan, 11 Iowa, 387; *Owens v. Ranstead*, 22 Ill. 161; *McGough v. Wellington*, 6 Allen, 505.

² *Stone v. Dana*, 5 Met. 98.

³ *Barrett v. Copeland*, 18 Vt. 67. See *Dana v. Lull*, 21 Vt. 383; *Bellows v. Allen*, 22, 108.

⁴ *Delvalle v. Plomer*, 3 Camp. 47.

dower, by three disinterested freeholders, is conclusive; and, if not true, he is liable to an action for a false return. *Estabrook v. Hapgood*, 10 Mass. 313.

When an officer's return of an execution states that he levied it on the land of the judgment debtor, for whom he appointed an appraiser, after giving due notice in writing to said debtor, "who neglected and refused to choose for himself:" the return must be taken to be true, in an action brought by the judgment

creditor for a trespass on the land; and the defendant in such action cannot impugn the levy, on the ground that the officer did not, after taking the land, allow the judgment debtor a reasonable time to appoint an appraiser, as required by statute, although all the proceedings are returned with the date of a single day. *Tyler v. Smith*, 8 Met. 599.

(a) It is both evidence in favor of, and most strongly construed against, the officer. *Smith v. Emerson*, 43 Penn. 456.

the process issued.¹ And, in general, the return of an officer is conclusive evidence against him. (a) Thus, where an officer returns on a warrant of distress, that he advertised the goods distrained twenty-four hours before the sale; he cannot give parol testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale.² So if a sheriff return that he has made the money and satisfied an execution, when in fact he had received payment in something else, it is held that he makes himself liable for money.³ So the return of the sheriff, that he has levied on certain property by virtue of the writ, is an affirmation that it is the property of the defendant.⁴

§ 19 b. But, in an action to which an officer is party, he may offer other evidence than his return of his own doings. Thus in trover by an officer against a stranger, for a chattel seized on execution, the officer is not required to prove the seizure by a return on the execution, but may prove it by parol evidence.⁵ And the mere omission to comply with some legal formality in his return will not make the officer a trespasser. Thus, in an action of trespass for taking and carrying away a wagon, the defendant offered in evidence a writ of attachment, directed to him as an indifferent person for service, and by virtue of which he took the property. Held admissible, although the defendant did not make oath to his return, before judgment in the suit upon which the property was taken.⁶

§ 20. The particular facts upon which the officer would rely, as exempting him from liability upon his general return, should be specifically stated.⁷ (b) Thus when a sheriff is prevented by force

¹ *The Governor v. Bancroft*, 16 Ala. 605.

² *Purrington v. Loring*, 7 Mass. 388.

³ *Tiffany v. Johnson*, 27 Miss. 227. See *Gay v. Edwards*, 30 *Ib.* 218.

⁴ *Thornton v. Winter*, 9 Ala. 613.

⁵ *Hovey v. Lovell*, 9 Pick. 68.

⁶ *Edmonds v. Buel*, 23 Conn. 242.

⁷ See *Barnet v. Bass*, 10 Ala. 951.

(a) In an action by the plaintiff in an execution against the sheriff, on his return of the execution levied, it is no defence, that the property levied on was not the property of the defendant. *Miller v. The Commonwealth*, 5 Barr, 294.

But where the sheriff returned upon an execution, that before its delivery to him another against the same party was placed in his hands, upon which he seized the debtor's goods; held, in an action for false return, he was not estopped to deny that the goods belonged to the debtor. *Remmett v. Lawrence*, 1 Eng. L. & Eq. 260.

(b) See *Morgan v. Spangler*, 14 Ohio St. 115; *Douglas v. Whiting*, 28 Ill. 362; *Castner v. Symonds*, 1 Minn. 427.

A return to a *fi. fa.*, that the judgment had been satisfied by the defendant in execution, is bad. *Abercrombie v. Chandler*, 9 Ala. 625.

When a sheriff is sued for failing to return an attachment, it is no defence that the property levied on was not subject to attachment. *The Governor v. Baker*, 14 Ala. 652.

Nor that the debt has been paid. *Ibid.* But he may show, in mitigation of dam-

from arresting a defendant, he should return the facts in excuse; but a return of *non est inventus*, in such case, is a false return.¹ So the return of "*cepi*," upon a writ of *ca. sa.*, is a sufficient return, and signifies that the sheriff has taken the body of the defendant, and has him ready to be produced, &c., and is *primâ facie* evidence of those facts. But in an action on the sheriff's bond for an escape, the plaintiff may deny and disprove such return; and, after a permissive escape has been proved, the burden of proof is upon the sheriff, to show that his return is true.² So it has been held, that a sheriff, having returned that he had levied on the property of the defendant in a *fi. fa.*, is estopped to deny the truth of such return.³ And a levy by an officer, even though not conclusive record evidence of the defendant's title, raises a strong presumption against the officer, which he must repel by proof. Hence, when a sheriff has indorsed a levy on property, which is afterwards taken from him by a writ, it is proper he should state the fact in his return; though his omission to do so will not preclude him from proving the fact by evidence *aliunde*.⁴ So a sheriff's return to a *fi. fa.*, setting forth as an excuse for not having sold and collected the money, that the goods were casually destroyed by fire; or a return of a judge's order to stay proceedings; is held *primâ facie* evidence of the fact, even in his own favor.⁵

¹ Houser v. Hampton, 7 Ired. 333.

² State v. Lawson, 2 Gill, 62.

³ Sutton v. Allison, 2 Jones, 339.

⁴ The Governor v. Gibson, 14 Ala. 326.

⁵ Browning v. Hanford, 7 Hill, 120.

See Phillips v. Lamar, 27 Geo. 228.

ages, that by a mortgage and sale of the property, previous to the seizure, the defendant had parted with his interest. *Ibid.* But see French v. Allen, 50 Me. 437.

A return of a constructive attachment of "all the hay and grain in the town of F.," is bad. Rogers v. Fairfield, 36 Vt. 641.

So, "served on A. B." Park v. Long, 7 Clarke, 434.

Where notice is required in "a public newspaper," the word "newspaper" is sufficient in the return; that it is public, being implied. Bailey v. Myrick, 50 Me. 171.

In reference to other execution creditors or to purchasers, the sheriff must designate the property taken in the body of his return, or by reference to an accompanying schedule. But, as to all other persons, the levy is a seizure, and the indorsement merely evidence of it. Thus, in an action by an officer for a mare, which after levy had been taken by the defendant; the plaintiff may prove that

the mare was one of "two horses" levied on, and so returned upon the execution. Weidensaul v. Reynolds, 49 Penn. 73.

A return to a service of summons is good, if signed by the sheriff, although the signature has nothing to indicate by what authority he served it. Thompson v. Haskell, 21 Ill. 215.

The word "served" is held sufficient. Folsom v. Carli, 5 Minn. 333.

Or a service by sale "pursuant to law." Tullis v. Brawley, 3 Minn. 277.

Primâ facie, a return of "served" by the proper officer on a writ in a foreign state, on which judgment has been rendered in that state, is sufficient. Latte-rett v. Cook, 1 Clarke (Iowa), 1.

In a mesne process of attachment, which does not divest property but merely creates a lien, it is sufficient that the return state that the process was duly executed; the acts of the officer are thereupon to be presumed regular, though not set out in detail. Ritter v. Scannell, 11 Cal. 238.

§ 20 *a*. But a return of *nulla bona* to a writ of *fi. fa.* means *no goods applicable to the plaintiff's writ*. Therefore, where a declaration, for a false return of *nulla bona*, alleges that the sheriff took in execution goods of the judgment debtor of the value indorsed on the writ, and levied the same thereout; to which the defendant pleads, that he did not levy *modo et formâ*: the defendant may show that the plaintiff's judgment was obtained by fraud, and that the defendant had paid over the proceeds of the levy to another execution creditor, although the writ of the latter was subsequent in date to that of the plaintiff.¹ (*a*) So, if a sheriff were ruled for failing to make the money on an execution, which he had levied on certain negroes, as the property of the defendant, he might rebut the *primâ facie* liability which his return raised against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons; and the writ of *habeas corpus*, and proceedings thereon, were admissible evidence for that purpose.²

§ 20 *b*. Although, in general, justification under a *return* implies not merely the making of the official certificate so designated, but its actual return to, or deposit in, the proper repository; it has been held, that the return indorsed upon a *fi. fa.*, stating the fact of a levy upon the defendant's property, is admissible evidence for the sheriff, in an action against him *by the defendant*, though the *fi. fa.* has not been filed in the clerk's office.³ So, where a sheriff was sued for breaking and entering the plaintiff's dwelling-house, after being forbidden so to do, and his right thus to enter depended upon his having previously levied upon personal property therein;

¹ Shattock v. Carden, 11 Eng. L. & Eq. 570.

² Union Bank, &c. v. Benham, 23 Ala. 143.

³ Glover v. Whittenhall, 2 Denio, 633.

(*a*) A creditor in a junior execution cannot sustain an action against the sheriff for falsely returning it *nulla bona*, by proof that a prior execution was issued on a judgment, confessed with intent to defraud creditors, and that the sheriff was notified of that fact while both executions were in his hands, and also that a claim would be made on that ground, to have the proceeds of property levied on applied on his execution. In such case, it is the duty of the junior execution plaintiff to move, without unreasonable delay, and procure a stay upon the sheriff's returning the prior execution, until his motion can be heard and decided. It is no part of the sheriff's duty, unless cognizant of facts

incontrovertibly establishing the fraud, to take the risk of the controversy, as to the validity of the judgment claimed to be fraudulent as against creditors; but only, after being notified that proper proceedings will be taken to determine the controversy, to retain the money levied on for a reasonable time. But, in such action, he cannot justify under a levy by a prior execution, which he has also returned *nulla bona*. He must either have executed it, and applied the proceeds of the property upon it, or have it in his hands so as to be bound to execute it and make such application. Paton v. Westervelt, 2 Duer, 362.

held, a statement of such levy, indorsed by the sheriff upon the *fi. fa.*, which had not been filed, with an inventory of the goods levied on attached thereto, was competent evidence for him of the facts stated in it.¹

§ 21. A sheriff is responsible for a trespass done by *his deputy*, by color of his office.² (a) Trespass is held the proper action against the sheriff, for an injury done by his deputy to the person or property of another.³ And in trespass against a sheriff, in which he

¹ Ibid.

² *State v. Moore*, 19 Mis. 369. See *Metcalf v. Stryker*, 31 N. Y. (4 Tiffa.) 648; *Pervear v. Kimball*, 8 Allen, 199.

³ *Campbell v. Phelps*, 17 Mass. 244; 1 Ib. 530. See *Morgan v. Chester*, 4 Conn. 387; *Waterby v. Westervelt*, 9 N. Y. 598.

(a) See *Dorr v. Mickley*, 16 Minn. 20; *Lee v. Fulkerson*, 21 Gratt. 182; *M'Kinley v. Tucker*, 59 Barb. 98. One specially deputed by a sheriff, though he has not taken the oath of office, is an officer *de facto*. *Merrill v. Palmer*, 13 N. H. 184.

It is sometimes held, that a deputy is not to be regarded as an agent of, or as sustaining an *identity* with, the sheriff; but the connection is one of *official relation and responsibility*. *Flanagan v. Hoyt*, 36 Vt. 565. It is elsewhere treated as a relation of *agency*. *Curtis v. Fay*, 37 Barb. 64.

It is held in Massachusetts, in a case which reviews former and somewhat conflicting decisions, that in the former view, of an independent office, one deputy sheriff may maintain an action against the sheriff for the act of another in taking from the former goods attached by him. *Robinson v. Ensign*, 4 Gray, 300.

Where a person acting under a void deputation levied on property, and the property, together with the execution, was returned into the hands of the sheriff, and by him sold; it was held, that the sheriff was protected by such execution, in a suit against him. *Crockett v. Latimer*, 1 Humph. 272.

A sheriff is liable for his deputy, whether the process was given the deputy by the sheriff or some other person. *Matthis v. Pollard*, 3 Kelly, 1.

Disputes between deputies of the same sheriff, respecting property attached by them respectively, should be adjusted by the sheriff, and not by actions between the deputies. *Foster v. Perley*, 9 Mass. 112.

In California, a *constable*, like any other ministerial officer, has the right to appoint as many deputies as he may please; and the deputy is not guilty of trespass in levying legal process in his hands. *Taylor v. Brown*, 4 Cal. 188; *Jobson v. Fennel*, 35 Ib. 711.

It is not criminal negligence in the sheriff, if the jailer, instructed to obey the

orders of a deputy, obeys clearly illegal orders. *Nall v. State*, 34 Ala. 262.

Where a deputy, at a sale on execution, obeys the specific directions of the plaintiff, the sheriff, as to such plaintiff, will be discharged from his liability. Otherwise, where the deputy neither acts in the line of duty as prescribed by law, nor obeys the directions of the plaintiff. *Sheldon v. Paine*, 10 N. Y. (6 Seld.) 398.

The return of a deputy is binding on the sheriff, in a case arising between one of the parties to an execution and the sheriff. *Ibid.*

A writ issued to the sheriff was served, and the return signed, by the deputy; and it appeared of record that the return was amended by the sheriff in open court, and a general appearance was entered. Held, though the sheriff's name should have been signed by his deputy, the defect was cured or waived. *Campbell v. Swasey*, 12 Ind. 70.

The service of a writ on the sheriff by his deputy, though invalid, must be pleaded in abatement. *Shaw v. Baldwin*, 33 Vt. 447. See *Dooley v. Root*, 13 Gray, 303; *Krum v. King*, 12 Cal. 412.

A warrant, issued by order of the Senate of the United States, for the arrest of a witness for contempt in refusing to appear before a committee of the Senate, and addressed only to the sergeant-at-arms of the Senate, cannot be served by deputy in Massachusetts. *Sanborn v. Carleton*, 15 Gray, 399.

A public officer, or other person who takes upon himself a public employment, is liable to third persons, in an action on the case, for any injury occasioned by his own personal negligence or default or that of his private agent or servant in the discharge of his official duties. But not for the negligence or default of his official subordinates. *Sawyer v. Corse*, 17 Gratt. 230.

is declared against personally, and not as sheriff, it is held competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. And it is not necessary to prove that the defendant directed his deputy to seize the particular property in question.¹ But trespass on the case, for any mere *nonfeasance* of the deputy, is held to lie only against the sheriff.² So the sheriff may be liable in trover for an act of his deputy. Thus a sheriff's officer seized goods under a *fi. fa.*, and packed them up. The execution was afterwards abandoned, on an agreement that the plaintiff in the action should receive goods for his demand instead of money. A portion of the goods, however, which had been seized, were afterwards sent by the under-sheriff's agent to the sheriff's officer, to hold till the plaintiff should pay him the expenses of the levy. The plaintiff afterwards paid the officer, and the goods were forwarded to the plaintiff. Held, a sufficient conversion, to render the sheriff liable in trover to the assignees of the defendant in the action, who had become bankrupt upon an act of bankruptcy committed before the execution.³

§ 22. It has been held, that, where a sheriff is liable for his deputy, they cannot be sued jointly.⁴ (See chap. 33, § 12.) It is otherwise, however, where the sheriff has expressly ratified the doings of his deputy. Thus, where a deputy levied upon and took property, in the hands of an alleged fraudulent purchaser, and sold enough to pay the execution, leaving a considerable surplus, of which a portion was returned to the purchaser in a damaged state, and another portion was not returned at all; and the sheriff had ratified all the acts of his deputy in the matter: held, they were jointly liable for the goods not returned, and for the injury to the others.⁵ (a) But, after a judgment in trespass *de bonis aspor-*

¹ Poinsett v. Taylor, 6 Cal. 78.

² Abbott v. Kimball, 19 Vt. 551.

³ Carlisle v. Garland, 7 Bing. 298.

⁴ Moulton v. Norton, 5 Barb. 286. See 1 Pick. 62.

⁵ Waterbury v. Westervelt, 5 Seld. 598.

(a) Trespass against the sheriff and S. his bailiff, for breaking the plaintiff's house and taking his goods. Plea by S., justifying under an writ of *feri facias* directed to the sheriff, and a warrant from the sheriff to him. Replication, alleging a prior warrant to J. and a seizure by J. under the writ and warrant, and payment by the plaintiff to the sheriff in satisfaction of the writ. Rejoinder, traversing the prior seizure under the writ and the payment to the sheriff. It appeared that L., the clerk and head officer of J., entered the plaintiff's house and seized his goods

under the warrant. The plaintiff paid the amount to L. at J.'s office, and L. withdrew the man in possession, and sent notice to the execution creditor, in J.'s name, that the money was levied. In the course of the same day J. died, and the execution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S., who seized the plaintiff's goods, and remained in possession for several days. The jury did not agree as to whether L. paid the money to J. before his death, but they found that L. executed the warrant by the

tatis against a deputy sheriff, and an execution levied on his body, but not satisfied, no action lies against the sheriff.¹

§ 23. The sheriff is responsible for the default of his deputy in the non-payment of money collected.² But he is bound only by *official* acts or defaults of the deputy. Thus the acceptance, by a deputy sheriff, of an order on him, to pay over the proceeds of an execution in his hands for collection; is not an official act, for which the sheriff is responsible.³

§ 24. Nor is the sheriff liable, in consequence of any act of the deputy, recognizing his own liability, in reference to an act for which the law would not hold the deputy responsible. Thus, where the sheriff was not bound by virtue of his office to cause an execution levied by him on land to be recorded in the registry of deeds; and his deputy, having so levied, received the fees for recording of the judgment creditor: the sheriff was held not answerable for the neglect of his deputy to record the execution.⁴

§ 25. A sheriff is not responsible for the act of his deputy, performed while he was the deputy of a former sheriff.⁵ But where a sheriff, on going out of office, becomes the deputy of his successor, the latter is liable for the acts of the former in respect to process which came to his hands while he was sheriff.⁶

§ 26. A deputy sheriff is bound to keep goods which he *attaches*, to be taken on execution, until thirty days after judgment, whether he remains in office until that time or not; and the sheriff, under whom he acted, is responsible for any omission of such duty. If such sheriff ceases to be in office before judgment is rendered, and the same deputy becomes the deputy of the succeeding sheriff, and the execution is put into such deputy's hands for collection, within the thirty days; he is bound, as deputy of the former sheriff, to have the goods ready to be taken on the execution, without any previous demand.⁷ (a)

¹ Campbell v. Phelps, 1 Pick. 62.

² Norton v. Nye, 56 Me. 211; Seaver v. Pierce, 42 Vt. 325.

³ Moore v. Jarrett, 10 Tex. 201.

⁴ Tobey v. Leonard, 15 Mass. 200.

⁵ Wilton, &c. v. Butler, 34 Me. 431.

⁶ Matthis v. Pollard, 3 Kelly, 1.

⁷ Lambard v. Fowler, 25 Me. 308.

direction of J., and that the money was received by L. in pursuance of authority from J. The judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages £400. Held, that there was sufficient evidence of a payment to J. after an execution *de facto* under the prior warrant; and that no irregularity in the execution could be taken advantage

of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and therefore there was no misdirection. Also, that the damages, though not excessive as against the sheriff, were excessive as against S. Gregory v. Cotterell, 18 Eng. L. & Eq. 99.

(a) Where a statute provides that a deputy of a sheriff may continue to act

§ 27. A sheriff may become liable to a *debtor*, as well as a creditor, for the wrongful acts of his deputy. Thus a deputy sheriff was ordered to attach certain real estate, which he did. He afterwards told the debtor, who was ignorant that the writ had been served, that he was going to attach personal property. The debtor asked him if money would not answer, and he replied that

after the death of the sheriff, and a subsequent statute, that in case of such death the coroner shall act as sheriff; the latter act does not repeal the former. *M'Cluskey v. M'Neely*, 3 Giln. 578.

In an action against a sheriff for the default of A., his deputy, the declaration averred, that the plaintiff recovered judgment against M., and took out execution thereon, and delivered it to A.; that goods and real estate were attached on the original writ by F., another deputy, and were held by him to satisfy said execution; yet that A. neglected to levy the execution on the real estate attached, and to seize and sell the goods attached, and to return the execution. The agreed facts in the case were, that the execution was sent to F. after he was out of office, and he delivered it to A. within thirty days after judgment, and informed him that the goods attached were delivered to O., who gave a receipt for them, and redelivered them to M., the debtor, who afterwards sold them; that F. and A. went to O.'s house, and A. demanded of him the goods; that F. then delivered the receipt to A., on the back of which O. had written and signed an acknowledgment, that A. had demanded of him the goods therein mentioned; that A. accepted said receipt, and that O. promised to pay the amount in a short time, but afterwards became insolvent; that A. had no knowledge of the attachment of the real estate within thirty days after judgment; that before the expiration of that time M. had alienated said estate; that no instructions were ever given to F. or A. to levy on real estate or in what manner to collect the execution; and that A. never returned the execution into the clerk's office, but enclosed it in a letter directed and sent by mail either to the clerk or to the creditor's attorney. Held, that A. was not guilty of any default, for which an action could be maintained against the sheriff, besides that of not returning the execution, for which the sheriff was liable to nominal damages. *Lawrence v. Rice*, 12 Met. 535.

Under the same facts it was held in another case, that F., though out of office, was bound to keep the property safely thirty days after judgment; but that, in order to charge him or the sheriff for his default, it must appear that the property

was demanded of him, unless he waived a demand, within thirty days after judgment, by an officer having the authority and charged with the duty of satisfying the execution. Also, that if A., who received the execution from F., was not to be considered as if employed by the plaintiff, then no person was authorized and employed by the plaintiff to serve the execution, and that no legal demand was made on F.; but if A. was to be considered as if he received the execution from the plaintiff, then he was the plaintiff's agent to demand the property of F. Held, further, that there was, 1st, either no demand by A. on F. for the property; or, if there was, then, 2d, that the delivery of the receipt by F. to A., after a demand on O. by F., or by A. in F.'s presence, rendered O. responsible on his receipt; and that the acceptance of the receipt by A. was an admission by him of a sufficient compliance with such demand, and a waiver of any further performance; and that the action could not be maintained. *Lawrence v. Rice*, 12 Met. 527.

An action on the case lies against an ex-sheriff, for omitting to deliver to the new sheriff a writ of *supersedens*, by reason of which omission the plaintiff was taken in execution. *Calthrop v. Phillips*, 2 Mod. 217.

It is held that one having a right of action against the representative of a deceased sheriff, whose estate is represented insolvent, for the malfeasance of the sheriff or his deputy, must prosecute his claim before the commissioners, and obtain a decree of the judge of probate in his favor, in order to entitle him to a remedy upon the bond given by the sheriff, for the faithful performance of the duties of his office, &c.; and he cannot maintain an action at law, except in the cases provided by the laws respecting insolvent estates. *Todd v. Bradford*, 17 Mass. 567. See *Mitchell v. Osgood*, 4 Greenl. 124.

If an officer seize the goods of A upon process against B, A may maintain an action against the officer, although his successor in office has sold the goods and received the proceeds. *Duke v. Vincent*, 29 Iowa, 308.

it would, upon which he received of the debtor a sum of money and made return that he considered it as personal property attached. The deputy having embezzled the money, the sheriff was held responsible to the debtor, who had been compelled to satisfy an execution issued in favor of the creditor.¹

§ 28. In an action against the sheriff for the misfeasance of his deputy, in general, the defendant can give nothing in evidence, which the deputy could not, were he the defendant. Thus he cannot, either by evidence or in pleading, falsify the deputy's return.² And, on the other hand, the letters and confessions of the deputy are held to be competent evidence, and the jury may prefer them to the testimony of witnesses.³ But the return of a person, styling himself deputy sheriff, is not evidence against the sheriff, without proving him to be a deputy.⁴ And it is said: "The declarations of an under-sheriff are evidence against his principal, not for the reason assigned in *Yabsley v. Doble*, 1 Ld. Raym. 190, that, as he has given security for the due performance of the duties of his office, his declarations go to charge himself, he being answerable over, and the real party in interest. But his declarations are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and then rather as acts than as declarations; his declarations being considered as part of the *res gestæ*."⁵

§ 29. Not only the deputies of an officer, but other parties whom he employs for his aid, may justify themselves under his authority. (a) Thus, where an officer, who is present at the commission of an offence, or on *hue and cry*, is not able to make an arrest, and calls in other officers or the *posse*, their justification is as broad as his own.⁶ But no one except the proper officer can execute a search-warrant.⁷

¹ *Knowlton v. Bartlett*, 1 Pick. 271. See *Bagley v. Yates*, 3 M' L. 465.

² *Gardner v. Hosmer*, 6 Mass. 325.

³ *Tyler v. Ulmer*, 12 Mass. 163; *Kemp-land v. Macauley*, Peake, 65.

⁴ *Slaughter v. Barnes*, 3 A. K. Marsh. 412.

⁵ Per Gibson, J., *Wheeler v. Ham-bright*, 9 S. & R. 390.

⁶ *Main v. McCarty*, 15 Ill. 441.

⁷ *Halsted v. Brice*, 13 Mis. 171.

(a) On the other hand, a person not an officer, but assuming to act as such, may not in all cases incur his liabilities. Thus one who, by false representations that he is qualified to serve civil process, induces another to commit a writ to him for service, is not liable to an action for neglecting to serve it. *Whitney v. Blanchard*, 2 Gray, 208.

Every citizen is bound to assist a known officer in making an arrest when called upon so to do, nor is he bound to

inquire into the regularity or legality of the process. *McMahan v. Green*, 34 Vt. 69.

A known officer had in his hands a warrant against John McManus. He arrested upon the warrant the plaintiff, John McMahan, and the defendant, at the request of the officer, assisted in making the arrest. Held, although the arrest was illegal, the request of the officer was a full justification to the defendant, and he was not liable for false imprisonment. *Ibid*.

§ 30. Although an officer, in order to *justify himself* alone, must prove a *legal commission and authority*; a third person, claiming under his acts, is required only to show that he assumed to be an officer and acted as such. And, if the officer is joined with him in a suit by a party claiming to be injured, the same privilege is also extended to the officer; more especially where a return has been made upon the process. Thus, where a shop, placed on land of the plaintiff with his permission, was sold on an execution against the owner, and the purchaser entered upon the land and removed the shop; in an action of trespass for such entry against the purchaser and his assistants, including the officer, the defendants may give in evidence the execution and return, without proving that the person levying the execution was an officer *de jure*.¹

§ 31. It will be seen hereafter, (a) that a master or principal is responsible for the wrongs committed by his servant or agent. The same principle applies to the party by whom a suit or prosecution is instituted, as liable for the misdoings of an officer, whom he employs to make service of legal process. (b) It is held, more especially, that the party, for whom a special deputy executes process, is answerable in trespass, if the deputy had not the authority of the law, but only the direction of the party. So, also, if the party assented to the unnecessary violence of the deputy, however he may have been appointed.² And, in general, one who extends the power of a court of special jurisdiction, to a case to which it cannot be lawfully extended, is a trespasser.³ Thus, where a warrant is issued from a justice's court, against a person

¹ Doty v. Gorham, 5 Pick. 487; Duncklee v. Locke, 13 Mass. 525.

² Stone v. Chambers, 1 Strobb. 117.

³ Curry v. Pringle, 11 Johns. 444.

(a) See *Master, &c.*

(b) In reference to the form of action, more especially for wrongful criminal prosecutions, it is said: "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." Per Ashurst, J., Morgan v. Hughes, 2 T. R. 231; acc. Elsee v. Smith, 2 Chit. 304. (See chap. 6.)

Trespass will not lie against a plaintiff in an execution, upon which the defendant's goods were levied and sold, on the

ground that the defendant in the judgment was not served with process. Baird v. Campbell, 4 W. & S. 191.

As to *joint* liability, see Snyder v. Brosse, 51 Ill. 357.

To render attaching creditors jointly liable as trespassers, they must be not merely together at the time of the levy, but in concert of action and co-operation. Eddy v. Howard, 23 Iowa, 175.

The plaintiffs in an attachment suit, having indemnified the sheriff, and directed him to take, remove, and sell all the goods of a firm whereof only a part of the members were defendants, are co-trespassers with the sheriff. Berry v. Kelly, 4 Rob. (N. Y.) 106. See Cook v. Hopper, 23 Mich. 511.

having a family, at the instance of the plaintiff, without the proof required by statute; it is at the peril of the party, and, if the defendant has been arrested, he may have an action of false imprisonment against the plaintiff.¹ (See chapters 6 and 16.) So, where B sued out execution against A, and after seizure and before sale the execution was set aside by rule of court, of which the sheriff received notice from A before the sale, and by the terms of which A was to bring no action for the seizure; the sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from B, held that A might sue B in trespass for the sale.² So A, party in a suit between A and B, told the clerk, that, if certain items of cost taxed by B should be allowed, an appeal to a judge would be insisted on; and, after the execution was made out, but was yet in the clerk's hands, A reminded him of the appeal claimed. Held, this was a sufficient entry of the appeal, and, B having obtained such execution through mistake, and after notice of the appeal having caused A to be arrested, whereupon A satisfied the execution; the execution was void, and B was liable to A in trespass, for the amount paid by A, with interest from the time of payment.³ So where property was levied upon by a constable, and *claimed*, and, in a trial before the constable, he found for the claimant, but the creditor directed him, notwithstanding, to sell, and gave him a bond of indemnity; it was held in trover by the claimant against the creditor, that these facts were evidence, not of title, but as tending to show a trespass by the defendant.⁴ So, where permission was given to a party in interest to use the name of another, as the plaintiff in a writ of attachment, in virtue of which the goods of a third person, not the debtor in the action, were attached by the direction of the real plaintiff; and, after the attachment, the nominal plaintiff, upon being inquired of by the agent of the owner of the goods, whether he was the real or the nominal plaintiff, replied, that he was "the plaintiff," and, upon being further asked if he had not better give up the property, replied, "I guess not:" held, a conversion of the goods.⁵ And where the party, in whose favor a legal process issued, directs the acts of the officer done under it, he cannot set up the defence, that the process, and not the direction, influenced the officer; or show that the trespass would have been committed without his interference.⁶ And, if an

¹ *Curry v. Pringle*, 11 Johns. 444.

² *Perkins v. Plympton*, 7 Bing. 676.

³ *Winslow v. Hathaway*, 1 Pick. 211.

⁴ *Matheny v. Johnson*, 9 Mis. 230.

⁵ *Walcott v. Keith*, 2 Fost. 196.

⁶ *Coats v. Darby*, 2 Comst. 517.

execution plaintiff attends the sale of property wrongfully levied on, and becomes himself a purchaser of a part thereof, he so far participates in the sale, as to become jointly liable with the sheriff to an action of trespass.¹ So a plaintiff directing, and a constable making, a levy and sale, against the consent of the defendant, of corn exempt from execution, are trespassers, whether they forcibly took and carried away the corn or not.²

§ 32. With more particular reference to the wrongful taking of one man's property by virtue of process against another: it is held, that, to maintain either replevin or trespass, it is not necessary to show an actual, forcible dispossession of the plaintiff; but any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain an action. And as a sheriff, by levying on goods and chattels, which are not the property of the execution defendant, is a trespasser; if the plaintiff in the execution directs the levy to be made, he is a trespasser also. The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them.³ And trespass has been said to be the only remedy for damage occasioned to the plaintiff, by the malicious act of the defendant, in causing an execution issued against a third person to be levied on property belonging to the plaintiff.⁴ But trover has also been maintained; though it is not sufficient to maintain trover against the plaintiffs in an execution, that their attorney in the judgment had directed the sale.⁵

§ 33. If an officer, by making an arrest under a void precept, renders himself liable for trespass, persons assisting him at his request are liable also.⁶ But a voidable execution, until avoided, is a protection to the party at whose instance it issued and was executed.⁷ So a party is answerable only for the validity of the process and for good faith in suing it out; not for any *irregularity* of the sheriff in executing it, unless committed by his orders.⁸ And, whether a subsequent assent to the trespass will or will not make him a trespasser *ab initio*, such assent must be clear and explicit, and founded on a clear knowledge of the trespass.⁹ Nor

¹ Deal v. Bogue, 20 Penn. 228.

² Atkinson v. Gatcher, 23 Ark. 101.

³ Stewart v. Wells, 6 Barb. 79; Lewis v. Jones, 2 Gale, 211. See Dameron v. Williams, 7 Mis. 138; 23 Ark. 101; Richardson v. Reed, 4 Gray, 441. See vol i. p. 80.

⁴ Tatum v. Morris, 19 Ala. 302; Hale

v. Ames, 2 Monr. 143; Libby v. Soule, 1 Shepl. 310.

⁵ Averill v. Williams, 4 Denio, 295.

⁶ Vinton v. Weaver, 41 Me. 430.

⁷ Cogburn v. Spence, 15 Ala. 549.

⁸ Adams v. Freeman, 9 Johns. 117.

⁹ Ibid.; West v. Shockley, 4 Harring. 287; Kreger v. Osborn, 7 Blackf. 74. See Read v. Markle, 3 Johns. 523.

is a plaintiff in execution liable, in an action on the case, for a tort committed by the sheriff in executing the writ.¹ (a) So the person, who assists an officer in making a legal levy, will not become a trespasser, by a subsequent abuse by the officer of his authority.² (b) So the execution creditor is not liable for taking the property of a stranger, unless he ordered the taking of it.³ So, when the party does not control or direct the course of an officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser by relation; the party is not affected by it, even when he receives the money coming by such irregularity, although aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. The expressing of an opinion under protest will not constitute such consent.⁴

§ 34. With regard to the *amount of damages* against an officer, it will be seen to depend upon the nature of the particular default committed by him. (c) In the present connection, however, it may be stated, that, in general, the amount of the judgment is *primâ facie* the measure of damages. And proof of actual damage is unnecessary.⁵ But, in case of unintentional default, the

¹ Princeton, &c. v. Gibson, Spenc. 138.

² Wheelock v. Archer, 26 Vt. 380.

³ Swinley v. Fahnestock, 18 Md. 391.

⁴ Hyde v. Cooper, 26 Vt. 552.

⁵ Douglass v. Baker, 9 Mis. 40.

(a) An action on the case will not lie by a landlord, against the plaintiff in execution, or against any other person, for advising, procuring, or commanding a sheriff to sell and remove the goods of a tenant whose rent is unpaid; such plaintiff or other person knowing that the sheriff had received notice that the rent was due, and intending to prevent the landlord from collecting it. Princeton, &c. v. Gibson, Spenc. 138.

A party cannot justify taking the property of a third person, as an assistant of a sheriff, unless the property is in fact taken by the officer under his process. It is no justification of such taking, that the assistant supposed, from the conduct of the officer, that the property had been attached. Johnson v. Stone, 40 N. H. 197.

(b) If an officer sell property attached by virtue of a statutory provision, without notifying the defendant; in trover, this does not make the attaching creditor jointly liable with him, unless he did something more than request a sale, although he join with the officer in a spe-

cial plea, if there is also a general several plea. Abbott v. Kimball, 19 Vt. 551.

(c) As in case of delay, till it becomes impossible to execute the process. Douglass v. Baker, 9 Mis. 40.

In an action against a sheriff, for not collecting and returning an execution against the property and body of A, B, and C, running against the property and body of A, and against the property of B, and C; the defendant may prove, in mitigation of damages, that A was, during the entire life of the execution, in Canada, and that no one of the debtors had any property, but they were absolutely bankrupt; that there was no bail or attachment, and that the plaintiff had not been damnified. And the plaintiff is only entitled to nominal damages. Ives v. Strong, 19 Vt. 546; acc. Kidder v. Barker, 18 Vt. 454.

In a suit against a sheriff for levying upon and selling goods of the wrong person, evidence, that he applied part of the proceeds of the sale to the discharge of a lien on the goods, is not admissible in mitigation of damages. McMichael v. Mason, 13 Penn. 214.

officer may prove the real injury sustained by the plaintiff. And, on the other hand, in case of wilful wrong, it is said that the plaintiff may recover, in addition to the debt, his incidental expenses and costs not taxable. A sheriff has been permitted to show, in mitigation of damages, the poverty of the debtor, or his continuing liability to arrest.¹ (a)

¹ Evans v. Manero, 7 M. & W. 463; Bing. 317; Young v. Hosmer, 11 Mass. Williams v. Mostyn, 4 M. & W. 145; 89; Commonwealth v. Lightfoot, 7 B. Weld v. Bartlett, 10 Mass. 470; Brooks Monr. 298.
v. Hoyt, 6 Pick. 468; Barker v. Green, 2

(a) A sheriff, by virtue of a *fi. fa.*, seized goods upon lands leased to a tenant, sold them for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action on the case against the sheriff for such removal, and the court refused, on payment into court of the sum which the goods produced, to stay the proceedings, until the plaintiff undertook to pay the costs of suit, in the event of his not recovering more than the sum paid into court. Calvert v. Joliffe, 2 B. & Ad. 418.

CHAPTER XXX.

ATTACHMENT AND EXECUTION.

1. Attachment — nature and purpose of an attachment — an *alternative* remedy.
3. Officer's title to, and right of action for, property attached. Title of a *receptor* or *keeper*.
4. Responsibility for failing to attach, or for property attached.
5. *Receptor* and *keeper*.
10. Right to indemnity; attachment of the property of a third person, or property not subject to attachment.
15. Liability of the officer to the defendant in the suit.
16. Trespass *ab initio*.
17. Levy of execution upon property attached; duty and liability of the officer.
19. Successive attachments.
22. Sale, &c., of property attached.
24. Rights and liabilities of the sheriff in connection with the acts of his *deputy*.
25. Effect, upon an attachment, of the *death* of parties.
27. Property exempt from attachment.
28. Damages.
30. Rights and liabilities of officers in connection with *executions*. Suit by a purchaser of property.
31. Property exempt from execution.
32. Successive acts of a levy may be joined.
33. Trespass *ab initio*.
34. Levy upon the property of a third person.
36. Mode of levy, and instructions relating thereto.
37. *Return* of executions.
40. Payment of money collected on execution.
46. Title of an officer to property levied on, and right of action therefor.
48. Damages.

§ 1. In those States where the practice of *attachment upon mesne process* (a) prevails, the rights and liabilities of an officer are often brought in question, in connection therewith.

(a) *Attachment* is the actual or constructive taking of property upon a writ, as security for the claim sued upon. But it seems that a return of an attachment of personal property does not conclusively prove a taking, so as to subject the officer to an action of trespass. *Boyn-ton v. Willard*, 10 Pick. 166. See *Hall*, 21 La. Ann. 692; *Talcott v. Rosenberg*, 8 Abb. Pr. N. S. 287.

And it has been held that an attachment cannot be made of personal property, though of such a kind that it cannot be immediately removed, by a mere indorsement on the writ. The officer must be present and take the property into his possession. *Darling v. Dodge*, 36 Me. 370.

In Louisiana, contrary to the general rule, possession is necessary to an attachment of real estate. *Kilbourne v. Frellsen*, 22 La. Ann. 207.

Where an officer attaches goods, and takes a receipt for the redelivery of them on demand, or payment therefor, and leaves them without removal; he must, in order to preserve the attachment,

retain the control thereof himself, or by his servant, or have the power of taking immediate possession. If the possession is abandoned, the attachment is dissolved. *Weston v. Dorr*, 12 Shep. 176.

The nature of the officer's possession and custody depends upon the nature and position of the property, the expense of removal, and the kind of possession retained by the owner; and, in general, it must be such a custody as will enable the officer to assert his control over the property, and as will probably prevent its being withdrawn or taken by another without his knowledge. (See § 3.) *Crawford v. Newell*, 23 Iowa, 453; *Hemmenway v. Wheeler*, 14 Pick. 408; *Bicknell v. Trickey*, 34 Me. 278. See *Rodgers v. Bonner*, 55 Barb. 9; *Marshall v. Town*, 2 Williams, 14; *Flanagan v. Jerome*, 5 Dutch. 391.

An officer, who was in possession of a room, allowed A to store personal property there, and afterwards, on a writ against A, attached the property and took exclusive possession of the room, fastened the outer door, but neglected to

§ 2. Attachment is a proceeding unknown to the common law, but often provided by statute in this country as a concurrent or

fasten an inner door leading to a wood-room. Held, a valid attachment. *Slate v. Barker*, 26 Vt. 647.

Where lumber attached was in the mill-yard of another, and the officer removed it from one to four rods, the removal was held sufficient to make an attachment, and to render the officer liable to the debtor for the property, after the creditor's lien was gone. *Fletcher v. Cole*, 26 Vt. 170.

An officer attached a parcel of hewn stones, lying in the town of Worcester, on land belonging to the Commonwealth, by going among and upon them, and directed the creditor, who had receipted for them, and whose place of business was about fifty or sixty rods distant from where the stones lay, and in sight of a part of them, to take charge thereof; but the stones were not removed. No notice was given to any one of the attachment, although there were persons at work or residing near, nor was any other mode adopted of giving notoriety to the transaction. A few days after the attachment, a person was summoned as a trustee in the same writ, and the creditor informed him of the attachment, but desired him not to inform any other person thereof, saying that he did not wish to injure the credit of the debtor. Held, that the attachment was valid, as against a subsequent attachment made without notice thereof, and that sufficient possession was retained to continue it in force. 14 Pick. 408.

See, as to the constructive attachment of bulky articles, *Clement v. Little*, 42 N. H. 563; *Polley v. Lenox, &c.*, 4 Allen, 329. An officer who attaches bales of hay, by leaving a copy of the writ in the town-clerk's office, is liable to the plaintiff for their safe-keeping to the same extent as if he had taken them into actual possession, and the failure to put any one in charge of the property or otherwise guard against its removal, is such neglect as will render him chargeable. *Fay v. Munson*, 40 Vt. 468. As to *appraisal*, in case of attachment, *Stockwell v. Byrne*, 22 Ind. 6; *Rawley v. Hooker*, 21 Ib. 144. As to the attachment of *perishable* property, "subject to natural and speedy decay," *Webster v. Peck*, 31 Conn. 495; *Pollard v. Baker*, 101 Mass. 259.

An officer may take possession of goods in a store under a writ of attachment; but he has no right to remain and exclude the owner, beyond a reasonable

time for completing the service. *Perry v. Carr*, 42 Vt. 50.

If a sheriff, having a writ of attachment, goes to the store of the debtor, whose clerk, in the absence of his master, locks the store and delivers the key to the officer; this is a sufficient attachment of the goods in the store, as against another officer, who afterwards, by the connivance of the debtor, attaches and removes them. *Denny v. Warren*, 16 Mass. 420.

So, where an officer enters a store, wherein there are goods belonging to the debtor, declares his intention to attach them, and afterwards locks the store, retaining the key: the attachment is held good against an attachment by another officer; he, or the creditor employing him, knowing of the prior attachment. *Gordon v. Jenney*, 16 Mass. 465. See *Lockwood v. Perry*, 9 Met. 440.

An officer undertook to attach a wagon, harness, and buffalo robe, and also a horse, and told the defendant that he had come to attach the articles, together with the horse which was in a barn not far distant, and also some goods in a shop. The defendant requested that the goods might not be taken and removed so as to create a public stir, and it was agreed that the creditor might take charge of the horse, wagon, harness, and buffalo robe. The horse was not seen by the officer, but the creditor on the same day went to the barn and fed the horse with hay. Held, a legal attachment of the whole property. *Morse v. Smith*, 47 N. H. 474.

But where an officer had attached certain articles, and afterwards mixed them with other articles of the same kind attached before by another officer, upon a writ against the same person; held, he lost the lien upon those articles which he acquired by his attachment, and the other officer rightfully retained them. 16 Mass. 465.

(See, as to the effect of *substitution*, or *mixture*, or *confusion*, in case of attachment or execution, *Yates v. Wormell*, 60 Me. 495; *Crosby v. Baker*, 6 Allen, 295; *Roth v. Wells*, 29 N. Y. (2 Tiff.) 471; 4 Barb. 194; *Morgan v. Spangler*, 14 Ohio St. 115; p. 172. That, before attaching goods not belonging to the debtor, though mixed with his, the officer must make inquiries; see *Carlton v. Davis*, 8 Allen, 94. As to the attachment of a joint interest, by taking the whole; see *Bernal v. Hovious*, 17 Cal. 541.)

And an attachment implies, that the

alternative remedy for the enforcement of a debt or other claim. It is well settled, however, that a plaintiff must *elect* between the two remedies of attachment and arrest, — he cannot resort to both. Thus, if an officer attach the estate of a defendant after having arrested him, and return only the attachment, he is liable for a false return to a subsequent attaching creditor.¹

§ 3. An officer, by attaching goods, acquires a special property in them, and trover is a proper action against a wrong-doer who converts them to his own use. And, as in other cases, actual use and exercise of ownership over the property, under a claim of a right of property and right of possession, asserted when the demand was made, is competent evidence of conversion.² (a) So the officer may maintain trespass, even though he have not actual possession. (See p. 160, n.) Thus where a deputy sheriff in Massachusetts, having attached goods, carried them into Rhode Island, and deliv-

¹ Brinley v. Allen, 3 Mass. 561.

² Lathrop v. Blake, 3 Fost. 46; 2 Tidd's Prac. 942. See Briggs v. Dear-

born, 99 Mass. 50; Parks v. Sheldon, 36 Conn. 466; Kelly v. Lane, 42 Barb. 594.

debtor has ceased to have possession or control of the property; and this notwithstanding any private agreement with the creditor. Thus, where a defendant, whose property had been attached, made an agreement with the plaintiff, that the defendant should take the property, and, if an adjustment of the suit should not be made, should return it, and the plaintiff might then sell or dispose of it as he chose, and apply the proceeds to his claim; and the property was thus delivered and returned, and afterwards sold by the officer upon the writ, the defendant forbidding the sale: it was held, that the defendant had a right to revoke the license to sell. Wallis v. Truesdale, 6 Pick. 455.

But the same principle does not apply to a third person in possession of property, under an alleged lien against the debtor. Thus, where goods in the possession of a party who had a lien on them were attached, and he receipted for them to the officer, under an agreement that he should continue to retain for his lien; and afterwards they were attached at his own suit, and he receipted for them, still asserting his lien: it was held that the lien was not discharged. And it was further held, the defendant in the suits not being the owner of the goods, and the general owner having brought replevin against the officer; that, although the attachments were void, and the defendant could not justify as an officer, he might do so as the servant of the

party having the lien. Townsend v. Newall, 14 Pick. 332.

Where a quantity of hay, cattle, and other personal property was attached, and the officer appointed a keeper, giving him an order of possession in the usual form, and posted up a notice of such attachment on a beam in the barn; and the keeper afterwards went off and abandoned all possession of the property: held, that the lien created by the attachment was thereby lost. Sanderson v. Edwards, 16 Pick. 144.

An attachment, in order to be legal and available, must be so *at the time*, and cannot become so afterwards. Thus, if an officer having a writ of attachment, take possession of the property of the debtor on Saturday evening, after sunset, with a view to the immediate operation of the writ upon the property as an original attachment; he acquires no lien, and the court will not give effect to it, as an attachment made at the earliest hour on the next Monday morning at which an attachment could lawfully be made, although the officer remain in possession of the property until after that hour. Fifield v. Wooster, 21 Vt. 215.

As to the return of an attachment, see M'Cloon v. Beattie, 46 Mis. 391; Davis v. Patty, 42 Miss. 509; Saunders v. Columbus, 43 Miss. 583; Odom v. Shackelford, 44 Ala. 331.

(a) See, as to the title of an officer to *bulky* articles, Johnson v. Grand, &c., 44 N. H. 626.

ered them to a bailee, taking his receipt, and the bailee put them into the hands of another person for safe-keeping; held, the officer might maintain trespass, and recover damages to the value of the goods, against mere strangers who took them away from the keeper in Rhode Island.¹ And the sheriff of another State may maintain his title to attached property.² So an officer may sue for property attached, though he has resigned and left the Commonwealth.³ So the *receiptor* of property attached, who has the actual possession of it for safe-keeping, may maintain trover against a third person, who takes it out of his possession without color of right.⁴ But where a sheriff, having attached personal chattels, delivers them to a third person for safe-keeping, such person is held the mere servant of the sheriff, and has no legal interest in the chattels; he cannot therefore maintain trover for them.⁵ (See p. 166, n.) And, on the other hand, where goods attached by a deputy sheriff are deposited in the hands of a keeper, to be forthcoming on demand; the sheriff has a special property in them, and may maintain an action for them against the keeper, for the benefit of the attaching creditor.⁶ (a) So it is held that an officer who has attached personal chattels, and delivered them, upon his accountable receipt, to a third person, who has permitted the owner to retain them, may lawfully take them from the owner, even after he has given him a summons.⁷ And an action lies for one deputy sheriff who has attached chattels, against another deputy of the same sheriff, who takes them from the bailee of the first deputy, upon another writ against the same party.⁸ And it is held that an *executor* of a deputy sheriff may maintain trover for property attached by the testator.⁹ So, if a debtor assign the property attached, to his cred-

¹ Brownell v. Manchester, 1 Pick. 232.

² Rhoads v. Woods, 41 Barb. 471.

³ Polley v. Lenox, &c., 4 Allen, 329.

⁴ Thayer v. Hutchinson, 13 Vt. 504.

⁵ Ludden v. Leavitt, 9 Mass. 104. See

Thayer v. Hutchinson, 13 Vt. 504.

⁶ Baker v. Fuller, 21 Pick. 318.

⁷ Bond v. Padelford, 13 Mass. 394.

See Waterhouse v. Bird, 37 Me. 230.

⁸ Thompson v. Marsh, 14 Mass. 269.

⁹ Badlam v. Tucker, 1 Pick. 389.

(a) In such case, a delivery by the keeper to an adverse claimant is equivalent to conversion. But, if delivered to the debtor's assignees, who had a right to the goods, subject only to the attachment: in an action brought by the sheriff against the keeper after thirty days from the rendition of judgment, the declaration ought to aver a demand upon the keeper, upon the execution, within the thirty days; or else that the keeper had disabled himself from delivering the goods. 21 Pick. 318.

Where a vehicle, advertised to be sold on execution, was delivered by a receiptor at his own house, and, the sale being adjourned, was left by the side of the road and partly in the travelled path, without any one being placed in charge of it by the sheriff; held, the attachment was not thereby abandoned, and the defendant, knowing the purpose to sell, was liable to him in trespass for taking it away. Houston v. Blake, 43 N. H. 115.

itor, in satisfaction of his judgment, the officer is still liable over, and will recover the full amount of one who wrongfully takes the property.¹

§ 3 *a*. But attachment of *real estate* gives to the officer no property or right of possession.² And where the plaintiff attached a quantity of starch, which was stored by the debtor in the barn of A, under an agreement that A should have a lien upon it for the security of a debt, as an officer, by virtue of certain writs against the debtor; and at the time of attachment the plaintiff did not move or take possession of the starch, except by notifying A that he had attached it: held, he had not acquired any such property in the starch, as would enable him to maintain trespass therefor, against one who subsequently attached and took possession of it on other writs of attachment.³ So a deputy sheriff who has attached bulky articles, and, without retaining possession, deposited a copy of the writ in the town-clerk's office, under (Mass.) Rev. Sts. c. 90, § 33, cannot maintain trover against one who has procured a subsequent similar attachment, but has not touched or removed, or caused any thing to be done to the property.⁴ And an attachment of an article, the sale of which is prohibited, is held to give no right to the officer to maintain an action against a person who takes such article from his possession.⁵

§ 4. Where a defendant, against whom an attachment has issued, and been placed in the hands of a sheriff for service, has sufficient property to satisfy the plaintiff's demand, the sheriff is liable for any deficiency, if he does not promptly levy on sufficient property.⁶ And, in an action against a sheriff for failing to serve a process of *garnishment* (a peculiar kind of attachment), the judgment recovered against the defendant in the attachment is *prima facie* evidence of the injury sustained, without producing the note on which it was founded.⁷ So the direction, by the attorney of an attaching creditor, to the officer, not to attach real estate, does not relieve the officer from liability for not keeping personal property attached by him upon the same writ, to respond to the execution.⁸ And where an officer *returns* an attachment, he is liable therefor to the plaintiff in the action, although the attachment was not made by direction of the plaintiff or his attorney; and

¹ Fletcher v. Cole, 26 Vt. 170.

² Scott v. Print Works, 44 N. H. 507.

³ Blake v. Hatch, 25 Vt. 555.

⁴ Polley v. Lenox, 15 Gray, 513.

⁵ Nichols v. Valentine, 36 Me. 322.

⁶ Ransom v. Halcott, 18 Barb. 56;

Chickering v. Failles, 26 Ill. 507; Chapman v. Thornburgh, 17 Cal. 87.

⁷ Kirksey v. Pryor, 13 Ala. 190.

⁸ Austin v. Burlington, 34 Vt. 506.
See Parrott v. Dearborn, 104 Mass. 104.

the plaintiff will be affected by no facts attending the attachment, which do not appear in the return.¹ So where, by virtue of express statutes, a mere *constructive* taking of property upon a writ, accompanied by certain prescribed formalities, constitutes an available attachment; as where property may be attached by leaving a copy with the town-clerk: the sheriff is bound to use ordinary care that it be forthcoming to answer the judgment.² (a) Though, if guilty of no misconduct or neglect of duty, he is not responsible, if, without his consent or knowledge, the articles are afterwards removed so that they cannot be found to be taken on execution.³ So a peculiar liability on the part of the officer is involved in the attachment of *live animals*. It is held that he must provide for their support at his peril; that he is answerable to the attaching creditor, and his apprehension of incurring expense in maintaining the cattle will not be an excuse for his not retaining them when attached.⁴

§ 4 a. Where a sheriff, by virtue of legal process, took into custody a vessel heavily laden with coal, lying near a wharf, and took no precautions to guard the vessel and cargo against the dangers of an impending storm, during which the vessel sunk; held, there was no evidence, to warrant the submission to the jury of the question of reasonable care and diligence on the part of the sheriff, but the jury should have been charged that he was liable on the ground of negligence.⁵ In the same case it was subsequently held, that the officer was bound to take such steps to insure the safety of the coal, as a careful, prudent man of good sense, well acquainted with the condition of the vessel and her location with regard to exposure to storms, might reasonably be expected to take, if the coal belonged to himself.⁶

§ 4 b. An officer is bound to exercise ordinary care in the custody of attached property, and is liable for all damages to the

¹ Franklin, &c. v. Small, 26 Me. 186.

² Smith v. Church, 1 Williams, 168.

³ Hubbell v. Root, 2 Allen, 185.

⁴ Sewall v. Mattoon, 9 Mass. 535.

⁵ Moore v. Westervelt, 2 Duer, 59.

⁶ Moore v. Westervelt, 27 N. Y. (13 Smith) 234.

(a) But in Massachusetts, after the Revised Statutes went into operation, and before the passing of Stat. 1838, c. 186, an officer was directed to "attach specially," without directions as to the property to be attached. He thereupon attached sufficient real estate; but the attachment was lost in consequence of an omission to deposit a copy of the writ, &c., in the clerk's office within three days. Held, the officer was not answerable to the creditor, although there was

sufficient personal property which might have been attached. Goodnow v. Willard, 5 Met. 517.

And in an action against an officer for not attaching goods, he may prove by the admissions of the plaintiff, that an arrangement had been made, by which he was to levy his execution upon real estate, yielding the personal property to other creditors. Weld v. Chadbourne, 37 Me. 221.

property occasioned by his negligence and wilfulness.¹ It has been recently held in Massachusetts, that, where attached goods are *stolen*, the officer is not liable unless guilty of negligence.² But it is held otherwise in Pennsylvania, and that a sheriff is absolutely liable for property levied on, unless deprived of it by act of God, sudden accident, or the public enemy.³

§ 4 *c.* In New Hampshire, a sheriff who has attached personal property is not liable for loss or injury, which is not caused by his negligence or want of ordinary care. When the question is, whether the goods were deposited by him in a suitable place, proof that certain insurance companies were accustomed to treat, as extra-hazardous, buildings like that where these goods were placed, is not admissible.⁴

§ 4 *d.* In Maine, in an action against an officer for not safely keeping goods attached; instructions to the jury, that, where the officer has taken the goods into his custody, and has not stated in his return on the execution that they were taken from him without his fault, the burden is on him to show that he exercised ordinary care in keeping them, and he must satisfy the jury that they were lost without his fault, are not sufficiently favorable to him. If the officer proves the loss of the goods, and the attendant circumstances, the burden of proof is then upon the creditor to show negligence. And, in such a case, *theft* is not presumptive evidence of a want of ordinary care.⁵

§ 5. As has been seen (p. 163), the attaching officer may deliver the property attached to some third person, who agrees to restore it on demand; (*a*) commonly called a *receiptor*. (*b*) Questions have arisen, as to the relative rights and liabilities of the officer and receiptor in reference to the title of the property. Thus a receipt, after enumerating certain goods, said, "the property of, &c. (the debtor), attached on a writ, &c., all which I promise to redeliver on demand." The goods were redelivered accordingly to the officer, and the receiptor immediately afterwards replevied them as his own property. Held, he was not estopped by his receipt, nor

¹ Vance v. Vanarsdale, 1 Bush, 504.

² Dorman v. Kane, 5 Allen, 38.

³ Hartleib v. M'Lane, 44 Penn. 510.

See Dorman v. Kane, 5 Allen, 38.

⁴ Kendall v. Morse, 43 N. H. 553.

⁵ Mills v. Gilbreth, 47 Me. 320.

(*a*) A receiptor has no right to restore the goods before demand, and thus terminate his liability. Rowland v. Cooper, 82 Mass. 53.

(*b*) Differing from a mere *keeper*, who is strictly a servant of the officer, under-

taking to keep the property *for him*; whereas a receiptor ordinarily interposes on the application and for the benefit of the debtor. See p. 163; Hartshorn v. Ives, 4 R. I. 471. See Boynton v. Warren, 99 Mass. 172.

by the redelivery of the goods, to deny that they were the property of the debtor.¹ (a) But where a receipt declares, that "this receipt shall be conclusive evidence against me, as to the receipt of said property, its value, and my liability, under all circumstances, to said officer:" the receiptor is estopped to deny that it was the property of the debtor; and the officer, therefore, cannot set up, as a defence to an action against him by the creditor for refusing to deliver the property attached, to be taken on execution, that it did not belong to the creditor, but to the receiptor.² (b)

¹ *Johns v. Church*, 12 Pick. 557. See *Main v. Bell*, 27 Wis. 517; *Dewey v. Field*, 4 Met. 381.

² *Penobscot, &c. v. Wilkins*, 27 Me. 345. See *Parks v. Sheldon*, 36 Conn. 466.

(a) It is held that an officer may deliver property attached to the creditor for safe-keeping, and take its value in money as security during the pendency of the suit, and the debtor cannot complain. *Gassett v. Sargeant*, 26 Vt. 424. See *Browning v. Hanford*, 5 Denio, 586; *The State v. Nelson*, 1 Cart. 522.

An officer delivered attached chattels to a bailee, but neglected to demand them on execution until after his lien had ceased, and the bailee refused to deliver them; whereupon he sued the bailee, and, pending the action, the attaching creditor agreed to indemnify him against all costs on account thereof. It not appearing that such suit was prosecuted at the attaching creditor's request, the agreement was held to be without consideration. *Balcom v. Craggin*, 5 Pick. 295.

In an action by a sheriff against a receiptor, it is held no defence, that the sheriff was not properly qualified, unless it appears that the suit is prosecuted solely for his benefit, and not for the benefit of the attaching creditor. *Taylor v. Nichols*, 3 Wms. 104. See *Wing v. Gleason*, 36 Vt. 376.

A receiptor becomes liable to the officer, if he does not deliver the property on demand. The contract is so strictly construed, that the receiptor for horses and hay, who contracts to deliver the same "free from damage or expense," is not entitled even to use any of the hay for the sustenance of the horses. And parol evidence is not admissible in an action against a receiptor, to show that "100 bushels of rye, valued at \$100," were in fact 100 bushels of rye unthreshed. Nor can a receiptor justify by showing that the property was mortgaged, if the mortgagee has made no demand upon him for the property. And

an offer to receive it, upon terms which are not complied with, is not a waiver of a previous demand. *Scott v. Whittemore*, 7 Fost. 309.

Another officer, on making demand upon a receiptor for property attached, must state by what authority he makes it. If his right to claim the property is not questioned, the authority distinctly claimed will be deemed to be admitted. *Phelps v. Gilchrist*, 8 Fost. 266.

The officer may take receipted property from one, to whom the receiptor has transferred it with notice and indemnity. *Briggs v. Mason*, 31 Vt. 433.

No action can be maintained by a sheriff against a receiptor, for property which the receiptor has at once redelivered to the defendant, who, before judgment, obtains an insolvent's discharge, his estate being duly assigned. *Shumway v. Carpenter*, 13 Allen, 68.

No action can be maintained on a receipt given to an attaching officer for the release of personal property mortgaged, when the mortgagee has been summoned as trustee under (Mass.) Gen. Sts. c. 123, §§ 57-71, and discharged; nor is the officer in any way liable. *Ibid*.

(b) The plaintiff having, as sheriff, attached certain goods, the defendants, as attorneys for subsequent attaching creditors and for the debtors, being desirous of having the goods sold at private sale instead of at auction, agreed with the first attaching creditor, that they should execute to the plaintiff a receipt for the goods at a certain valuation, and should thereupon receive the goods and dispose of them as they desired. Accordingly the defendants executed and delivered to the plaintiff a writing, acknowledging the receipt of the goods from him, and agreeing to keep them free of expense, and return them to him on demand, or

§ 6. If goods attached upon a writ against a third person are delivered to the owner, upon his written receipt and promise to redeliver them to the officer on demand, the owner may nevertheless maintain trespass against the officer; although, in an action by the officer upon such receipt, the owner of the goods would be estopped to set up property in himself. The measure of damages is the value of the goods at the time of attachment, but without interest for the time during which the owner had the use of them under the receipt.¹ So the defendant, claiming a wagon as his own, took it out of the possession of the plaintiff, and held it about ten days, when the plaintiff attached it, as the property of the defendant, and the officer delivered it for safe-keeping to the plaintiff's hired man, who placed it under the plaintiff's shed. The plaintiff thereupon brought trespass against the defendant, for the original taking of the wagon; and it was held, that the wagon was not to be deemed, as matter of law, to have been returned to the plaintiff, by virtue of its having been so attached by him, and placed under his shed; that the plaintiff was not thereby estopped from claiming that he had title to the wagon, when it was taken by the defendant; that the rule of damages was the value of the property, with interest from the time of conversion; but, as this did not appear, interest was not to be included; and that further damages for detention of the property were not allowable.²

§ 6 *a*. A receiptor, if intrusted with the property without the agency of the creditor, is the agent of the officer, and for his torts or neglect the officer is liable.³ His insolvency and consequent inability to respond to a demand of the property on the execution furnish no defence for the officer, even though the receiptor, when taken, was actually responsible, but afterwards became insolvent.⁴ Nor can the officer rely upon the consent of the creditor's attorney that the officer may take receiptors, given

¹ Robinson v. Mansfield, 13 Pick. 139.

² Lewis v. Morse, 20 Conn. 211.

³ Gilbert v. Crandall, 34 Vt. 188.

⁴ Austin v. Burlington, 34 Vt. 506.

pay the stipulated value; and they thereupon received the goods and disposed of them at private sale. Held, this was equivalent to the ordinary receipt; that it was a contract, and not a mere receipt; that trover could be maintained against the defendants for failure to return the goods on demand, and to pay the stipulated price; and that parol evidence was not admissible, to show that at the time

the receipt was given the parties agreed that the defendants might sell the goods. *Brown v. Gleed*, 33 Vt. 147.

A receiptor for goods seized on execution is estopped from denying the sheriff's ownership, even when the judgment debtor had no property, and this fact was known to the sheriff. *Cornell v. Dakin*, 38 N. Y. 253. See *Foltz v. Stevens*, 54 Ill. 180.

generally, and, without naming any receiptors, or referring to the responsibility of those to be taken, and a request to the officer, that, before he removes the property he will go to the debtor, and see if he will furnish receiptors.¹ But if, in defence of an action against a sheriff for a default of his deputy in not keeping property attached, it is proved that the plaintiff's attorney consented that the deputy might take a receiptor; it is erroneous to instruct the jury, that such consent "should have been expressed with the intent of influencing or controlling the officer's conduct, and of assuming the risk upon the plaintiff himself."²

§ 7. The approval, by a plaintiff, of the person taken as receiptor, does not exonerate the officer from making effort to find the property, that it may be sold on execution, or of bringing a suit upon the receipt.³ And a sheriff who attaches personal property, and leaves it in the possession of a receiptor, by whom it is delivered to the owner, who converts it to his own use; is estopped by his return of such attachment, when called upon to seize and sell the property on the execution, to deny that the property is in his hands, both as against the original attaching creditor, and as against the assignees of the debtor in insolvency, admitted to prosecute the suit under the provisions of an insolvent law.⁴

§ 8. When the receipt promises that the property shall be delivered "on demand;" a demand is necessary previous to commencing a suit on the receipt, notwithstanding the inability of the receiptor to redeliver the property.⁵ But, after demand, trover will lie against a receiptor,⁶ either by the sheriff, to whom the receipt is given, or in his name, for the benefit of those whose rights are to be affected. And where the receiptor has mortgaged the property to pay his own debts, a demand and refusal are not necessary, in order to sustain trover. The conveyance of the property is a conversion.⁷ So where two receipt for property, and one of them converts it with the knowledge of the other, who does not interfere to prevent the conversion; a subsequent demand upon the latter, and a non-compliance with the demand, are competent evidence of a joint conversion.⁸ So the receiptor's written acknowledgment, upon the receipt of a demand upon him, at a

¹ *Austin v. Burlington*, 34 Vt. 506.

² *Wright v. Willis*, 2 Allen, 191.

³ *Allen v. Doyle*, 33 Me. 420.

⁴ *Bacon v. Lincoln*, 2 Cush. 124.

⁵ *Bacon v. Thorp*, 27 Conn. 251; *Bick-*

nell v. Hill, 33 Me. 297. See *Phelps v. Gilchrist*, 8 Fost. 266.

⁶ *Webb v. Steele*, 13 N. H. 230.

⁷ *Stevens v. Eames*, 2 Fost. 568; 13 N. H. 230; 10 Ib. 199.

⁸ *Ibid.*

certain date, is sufficient evidence.¹ (a) So the receiptor will be liable for a conversion, if he has destroyed the property by his own act, or, in case the property be live stock, if he has killed it by violence, or caused its death by cruel treatment, starvation, or want of ordinary care.²

§ 9. A receiptor, under some circumstances, may doubtless be liable to the debtor, as well as the officer or creditor. But where a receiptor, in a suit in one State, having taken the property to his residence in a neighboring State, there pointed it out to an officer, and permitted it to be attached, and taken from him, on a writ sued out by the plaintiff in the first action, returnable to the courts of that State; held, the receiptor was not liable in trover to the defendant, on the plaintiff's abandoning the suit in the former State.³

§ 10. In respect to the rights and liabilities of an officer, connected with the seizure, either upon attachment or execution, of property the title to which is doubtful, and more particularly which is not in the possession of the debtor: it has been held, that if a sheriff, upon the representation of the creditor, seized goods as belonging to the debtor, and damages are recovered against the sheriff by a third person, claiming the goods; an action upon the case lies, at the suit of the sheriff, against the creditor, although there were no fraud in the representation, or knowledge of its falsehood.⁴ So, that the plaintiff pointed out certain property to the sheriff to be levied upon, is a sufficient offer of indemnity, unless objected to at the time, to oblige the sheriff to pursue the plaintiff's instructions, unless he can show that they were clearly unreasonable. And, if he does not pursue them, he may be ruled for the damages caused by that failure.⁵ (b)

¹ *Cargill v. Webb*, 10 N. H. 199.

² *Cross v. Brown*, 41 N. H. 283.

³ *Chase v. Andrews*, 6 Cush. 114.

⁴ *Humphrys v. Pratt*, 5 Bligh N. R. 154.

⁵ *Mullings v. Bothwell*, 29 Geo. 706; *Levy v. Shockley*, *ib.* 710.

(a) As a creditor of two joint debtors has a right to secure his claim by attaching the property of both or either of them; where A, in a suit against B and C, directed the officer to attach the property of B, and not of C, which he did; and afterwards the officer put the property into the hands of D, and took from him a receipt, promising to redeliver such property on demand, without informing D of the direction given by A in relation to the attachment: in an action brought by the officer, on such receipt, against D, it was

held, that such attachment was no violation of the rights of B or C, and that the want of such information to D was not a constructive fraud. *Marion v. Faxon*, 20 Conn. 486.

(b) An action lies, to try the right of a third party to property levied on by a writ of attachment, before judgment against the defendant in attachment. *Sherwood v. Houston*, 41 Miss. 59.

Upon the general subject of an adverse claim to the property, there is no substantial difference between an attachment and

§ 11. But, on the other hand, it is held, that the law will not imply an indemnity to the officer, if he attach property not in possession of the debtor without special orders; and therefore he is not bound to attach such property, unless specially requested by the creditor or his attorney.¹ Nor is a sheriff liable, for failing or refusing to levy on, or after levy to sell disputed property, unless he is indemnified. And his return as to the facts is evidence for him, to be considered by the jury with the other evidence in the cause. Nor is it necessary that he should notify the plaintiff or demand indemnity.² Thus, if a sheriff levies upon goods as the property of A, in which B claims a partnership, and the plaintiff refuses, upon request, to indemnify the sheriff; he may either return the writ *nulla bona*, or refuse to sell any thing but the inter-

¹ Weld v. Chadbourne, 37 Me. 221; Shriver v. Harbaugh, 37 Penn. 399.

² Shriver v. Harbaugh, 37 Penn. 399;

State v. Sharp, 2 Sneed, 615. See Green v. Hackley, 3 Met. (Ky.) 386; Connelly v. Walker, 45 Penn. 449.

an execution. The following cases relate indiscriminately to both:—

Where a sheriff levies on property, with notice of an adverse claim, under a promise by the plaintiff to indemnify him before the sale; the sheriff is liable for the property, if it belonged to the execution defendant, although the plaintiff has not indemnified him, where no demand of indemnity has been made. Miller v. Commonwealth, 5 Barr, 294.

A laborer, who had a lien for helping to drive the logs of several owners intermingled together, in order to enforce his lien, attached a part of them, and seasonably delivered the execution to the officer, who refused to sell them. Held, as the officer did not show that he would have been required to take the property of one person to pay the debt of another, or to do any unlawful act, he was liable for such refusal. Doyle v. True, 36 Me. 542.

A sheriff is bound to levy a mortgage *fi. fa.* on the mortgage property described in the process, even though in the possession of a third person holding adversely to the mortgagor. Wallace v. Holly, 13 Geo. 389.

A sheriff, being about to make an attachment, omitted to do so, in consideration of a bond given by the defendant in the suit, conditioned to save him harmless, and to pay the judgment which might be recovered. In a suit brought by the plaintiff in the original action upon this bond; held, it was given to indemnify the sheriff against a breach of his official duty, and was therefore invalid from considerations of public policy, and could not be enforced either by the sher-

iff himself or by the plaintiff. Cole v. Parker, 7 Clarke (Iowa), 167.

Whenever an officer, in good faith, and in the exercise of his official discretion, doubts whether personal property levied upon by him under execution is subject to levy or sale, the law gives him the right to demand the bond of indemnity required by § 709 of the (Kentucky) Civil Code. Board v. Helm, 2 Met. (Ky.) 500.

A sheriff paid out of the proceeds of sale of real estate, sold on execution, the amount of a judgment which was supposed to be a lien, and took from the judgment creditor a refunding receipt; the money was subsequently recovered from him by other parties, on the ground that the judgment was not a lien; and the sheriff brought suit to recover back the money paid. Held, it was a good defence, that the sheriff had purchased other real estate from the defendant in the execution, on which this judgment was clearly a lien, and had agreed to pay it off as a part of the consideration. Morrison v. Mullin, 34 Penn. 12.

The sheriff's return upon an execution showed, that process had not been served on the party whose property had been seized by him, but on another person of the same name, and that the levy was made with the understanding that he was to be indemnified by the plaintiff before selling. Upon motion for a rule against the sheriff to compel him to make the sale, held, he was justified in doubting whether the property was subject to the execution, and in demanding of the plaintiff a bond of indemnity. Board v. Helm, 2 Met. (Ky.) 500.

est of A.¹ So where a sheriff has reason to doubt whether goods are the property of a debtor, it is held that he may insist on the creditor's showing them to him, and also on being indemnified for attaching or levying upon them. But if, without making any such claim, he undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power to do so.² It is held in a late case, that a sheriff is not bound to accept a bond of indemnity, the sureties upon which reside out of his own county. Judge Sharswood says, "the sheriff is an officer, whose duty is not only to execute all writs and process, but he is also the principal conservator of the peace within his bailiwick. This function . . . demands his constant presence in the county."³

§ 12. A precept against one person, as has been seen (chap. 29, §§ 5, 32), does not justify the officer in attaching the goods of another. (a) Thus the wrongful attachment of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is held such a conversion, as will support an action of trover by the owner against the sheriff.⁴ But it is held, that an officer attaching goods of a third party is not liable, without notice of the claim to the goods, and a demand for them; even though he was indemnified before seizing the goods. And a conversation between the claimant and the officer's bailee cannot be held as notice.⁵ So, if the goods of a stranger are in the possession of a debtor, and so mixed with those of the debtor, that the officer, on due inquiry, cannot distinguish them; the owner can maintain no action against the officer for taking them, until notice, and a demand of his goods, and a refusal or delay of the officer to redeliver them.⁶ But where an officer, by instructions, demanded upon a writ all the property in a certain list, refusing to accept less, and informing the defendant that such were his instructions; held, if such demand embraced any property to which he was not entitled, the defendant was absolved from tendering the rest.⁷

§ 13. In trespass against an officer, for attaching property of the plaintiff, in an action against him which was not sustained: he is

¹ *Patterson v. Anderson*, 40 Penn. 359.

² *Bond v. Ward*, 7 Mass. 123. See *Bagley v. Bates*, 3 M'L. 465; *Campbell v. Johnson*, 11 Mass. 184.

³ *Com v. Vandyke*, Leg. Intell.

⁴ *Abercrombie v. Bradford*, 16 Ala. 560.

See *Shackelford v. Planters'*, 22 Ala. 238; *Simpson v. Watrus*, 3 Hill. 619.

⁵ *Taylor v. Seymour*, 6 Cal. 512. But see *Boulmare v. Craddock*, 30 Cal. 190.

⁶ *Bond v. Ward*, 7 Mass. 123. See *Stedman v. Perkins*, 42 Me. 130; p. 161 n.

⁷ *Gragg v. Hull*, 41 Vt. 217.

(a) The attaching creditor is liable to the true owner. *Murray v. Lovejoy*, 2 Cliff. 191.

not estopped to show that the property belonged to him, although at the time of the attachment he declared it belonged to a stranger; the plaintiff having acquired no advantage, and the officer having sustained no damage, by such declaration.¹ And, on the other hand, in an action of trespass against an officer, for taking and carrying away goods, which he has attached and claims to hold as the property of the plaintiff, the officer is not estopped to deny the property of the plaintiff.²

§ 13 *a*. If horses belonging to A and B are accidentally placed in a stable together, and an officer selects two of them as the horses of A and attaches them, intending to hold them at all events, and insists upon holding them after notice that one of them belongs to B; the officer will be liable in trespass if the horse did belong to B, and B will not be estopped to claim it by some fraudulent act on his part.³

§ 13 *b*. An attachment of property legally attachable, upon a valid claim, is not rendered unlawful by the officer's knowledge that the plaintiff's purpose is to restore the property to another person.⁴

§ 14. The liability of the officer, for failing to make an attachment, involves a corresponding power to do whatever may be necessary for the execution of this precept. Thus if a person, having in his store the goods of the defendant named in a writ, refuses to permit an officer to enter the store for the purpose of attaching the goods, the officer is justified in breaking it open for such purpose.⁵ (*a*) And if the goods of a debtor are secreted in the store or warehouse of a third person, the officer may, even in the night, break open the outer door for the purpose of seizing them, after an unsuccessful demand of admittance upon one having the key, however he may have come in possession of it.⁶ But when boxes at a depot for transportation contain attachable articles, the officer is not authorized to remove the boxes from the depot unnecessarily, for the purpose of attachment; though he may take possession of, and open the same, and attach any property liable therein.⁷ So, if an officer would take goods belonging to A and in A's pos-

¹ Wallis v. Truesdell, 6 Pick. 455.

² Roberts v. Wentworth, 5 Cush. 192.

³ Moore v. Bowman, 47 N. H. 494.

⁴ Wakefield v. Fairman, 41 Vt. 339.

⁵ Platt v. Brown, 16 Pick. 553.

⁶ Burton v. Wilkinson, 18 Vt. 186.

⁷ Peeler v. Stebbins, 26 Vt. 644.

(*a*) The assistants of a sheriff's officer, for the purpose of executing a *fi. fu.*, illegally entered the plaintiff's premises on Sunday, by breaking open a window, but, by the officer's direction, abandoned possession on the Monday following. On the

Thursday after, the officer himself entered the same premises to execute a distress warrant, and seized goods. Held, he might sell the goods. Percival v. Stamp, 24 Eng. L. & Eq. 399.

session, upon a writ against B, A may maintain his possession by force, in the same manner as he might against any other trespasser.¹ And if an officer attaches property not liable to attachment, he is a trespasser;² and an action of trespass lies against him.³ (a) So, in an action against an officer, for attaching the property of the plaintiff in a suit against another person, the defendant cannot justify under the writ, even though there may be grounds of justification, without showing, that, if then returnable, it has been duly returned.⁴

§ 15. An attachment does not change the ownership of property. The officer is the agent of both parties, and may be liable to either. (b) But if the property is lost, without the neglect of the officer or the plaintiff, the loss must be sustained by the defendant, who has failed to pay the amount due. A plea, therefore, that property was *attached and lost*, is defective, in not showing how the loss occurred.⁵ Where final judgment is rendered in favor of the defendant, trover will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property.⁶ Nor, as between the owner of goods and an officer, will replevin lie for property in the hands of the latter by virtue of an attachment, unless exempted from execution or attachment.⁷ And in order to sustain an action for an *excessive* attachment, the allegation and proof must be substantially the same as in a suit for a malicious action, that is, want of probable cause and express malice; and the attaching creditor will ordinarily be the only person liable to such action. And, on the other hand, the general rule is laid down, that an attaching creditor can in no case be held jointly liable with the officer for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it.⁸ (c)

¹ Commonwealth v. Kennard, 8 Pick. 183.

² Foss v. Stewart, 2 Shep. 312.

³ Bean v. Hubbard, 4 Cush. 85.

⁴ Russ v. Butterfield, 6 Cush. 242.

⁵ Star v. Moore, 3 McLean, 354; acc. Conway v. Nolte, 11 Mis. 74.

⁶ Abbott v. Kimball, 19 Vt. 551.

⁷ Keyser v. Waterbury, 7 Barb. 650.

⁸ Abbott v. Kimball, 19 Vt. 551.

(a) This is the proper form of action at common law: but since the statute of Massachusetts, 1839, c. 151, § 4, providing that "in all actions on the case it shall be no objection to maintaining such actions that but for this act the form thereof should have been trespass;" trover will equally well lie. Davlin v. Stone, 4 Cush. 359.

(b) An officer, holding a process against several *joint* parties, is not bound to regard the equities subsisting among the debtors, nor can he be subjected to a suit in favor of a co-obligor or surety, for any default in enforcing an execution against the principal debtor. Rutland v. Paige, 24 Vt. 181.

(c) A sheriff who makes an excessive

§ 16. We have already had occasion (vol. i. p. 113) to consider the general doctrine of *trespass ab initio*, (a) whereby the subsequent abuse of an authority conferred by law subjects a party to an action for an act originally justifiable. Upon this principle, where an attachment has been set aside as irregular, the persons making it stand as though no process had ever been issued, and become trespassers *ab initio*; and, notwithstanding a subsequent levy of execution, the owner may rely upon the original wrong, and recover the full value of the property.¹ So if, on attachment of goods, the officer continue in possession of the defendant's house, or keep the goods therein, for a long and unreasonable time, instead of removing them to a place of safe custody; he is a trespasser *ab initio*.² (b) So an officer, who enters a house by authority of law, and attaches goods therein, becomes a trespasser *ab initio*, by placing there an unfit person, as keeper of the goods, against the remonstrance of the owner of the house.³ So in case of sale, after appraisement by an interested person, the officer is a trespasser

¹ Lyon v. Yates, 52 Barb. 237.

³ Malcom v. Spoor, 12 Met. 279.

² Reed v. Harrison, 2 W. Black. 1219.

attachment of property, then sells on execution more than is sufficient to satisfy the judgment, returns a small part of the property to the parties claiming it, but in very damaged condition, and retains in his hands the surplus of the proceeds of the sale on execution, is liable for the surplus and for the damage in an action brought by a purchaser of the property, prior to the attachment, whose title is in fraud of creditors and void as to them. *Waterbury v. Westervelt*, 5 Seld. 598.

B, as constable, attached the joint property of A and S., on writs against both. The property was appraised without notice to A, and S. deposited with B the appraised value, and received the property. The suit resulted in A's favor, and, after demanding the property of B, A brought trover for it. Held, that this was not equivalent to a public sale of the whole property; nor was B guilty of a conversion; and that a delivery to S. was to all intents a delivery to A. *Gassett v. Sargeant*, 26 Vt. 424.

Replevin is held not to lie against an officer, who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to redeliver the goods. *Gardner v. Campbell*, 15 Johns. 401. See *Baker v. Fales*, 16 Mass. 147; *Stoughton v. Mott*, 25 Vt. 668.

(a) See *Ackroyd v. Ackroyd*, 3 Daly, 38. "The general rule is in the *Six Car-*

penters' Case (8 Co. 146 a); where there is an authority given by law for doing an act, there an abuse may turn the act into a trespass *ab initio*. The rule is said to rest upon this—that the subsequent illegality shows the party to have contemplated an illegality all along, so that the whole becomes a trespass." Per Little-dale, J., *Smith v. Egginton*, 7 Ad. & Ell. 176; 6 Dowl. P. C. 38. See *Trespass*; p. 129, n.; 157, § 33.

(b) So it is held in Massachusetts, in virtue of certain statutory provisions, that a mortgagee or pawnee of goods in a store, who has taken possession of the store and goods, with the consent of the mortgagor or pawnor, cannot maintain an action of trespass against an officer, for entering the store for the purpose of attaching the goods, at the suit of a creditor of the mortgagor or pawnor, unless the officer keeps possession of the store for an unreasonable length of time, so as to make himself a trespasser *ab initio*. *Rowley v. Rice*, 11 Met. 337.

If a judgment debtor, whose property has been attached on mesne process, has paid the judgment, and informs the officer thereof, and demands his property within thirty days from judgment; and the officer, without asking for delay, or authority from the judgment creditor, replies that it is lost and he cannot deliver it up: this is a waiver of any right to further time. *Dorman v. Kane*, 5 Allen, 38.

ab initio.¹ So where an officer sells property attached, without pursuing the provisions of the statute on that subject, and the defendant prevails in the suit; the officer becomes a trespasser *ab initio*, and is liable to an immediate action, without any previous demand on him for the chattels.² And though the suit on which the property is attached is still pending.³ (a) So a purchaser, in fraud of creditors, may maintain an action against an officer, who has attached the goods upon a writ against the vendor, if by the illegal sale thereof the officer has become a trespasser *ab initio*; although, at the time when the action was commenced, the officer's proceedings had all been regular and legal.⁴ So, if property attached be used by the officer, he thereby becomes a trespasser *ab initio*, and is liable *primâ facie* for its full value; but, if it be received back by its owner, or legally disposed of upon the execution, the officer is liable only for the damages occasioned by such use.⁵ So where an officer attached the desk and law-books of an attorney, and, having neglected to remove them for five hours of daylight, on demanding possession of the office for the night, was locked in; held, he had become by such neglect a trespasser, and could not maintain an action for false imprisonment.⁶

§ 16 a. But an officer or authorized person, who has regularly attached personal property in a suit against the owner, will not be liable to the latter in trover, for a mere neglect to take proper care of the property while under attachment; neither will such neglect render him a trespasser *ab initio*. The proper remedy is a special action on the case.⁷ And, in an action by the defendant

¹ McGough v. Wellington, 6 Allen, 505.

² Wallis v. Truesdell, 6 Pick. 455.

³ Ross v. Philbrick, 39 Me. 29.

⁴ McGough v. Wellington, 6 Allen, 505.

⁵ Collins v. Perkins, 31 Vt. 624.

⁶ Williams v. Powell, 101 Mass. 467.

⁷ Nutt v. Wheeler, 30 Vt. 436.

(a) A sale of attached property by a sheriff, under order of a county court judge, issued in vacation, ought to be reported by the officer and confirmed by the circuit court; and § 255 (Kentucky) Civil Code expressly confers this right of confirmation, as well in cases of sales during the pendency of the action as after judgment; and, if the sale be not so reported and confirmed, it may afterwards be set aside by the court. Greer v. Powell, 3 Met. (Ky.) 124.

A constable who decides between the conflicting claimants of money in his hands, received from the sale of perishable property attached by him, does so at his peril, and he and his sureties are re-

sponsible if he decides wrongly. Howard v. Clark, 43 Mo. 344.

The purchaser of goods sold under an attachment acquires a good title, though judgment is never recovered in the action. Morse v. Morse, 44 Vt. 84.

Where goods are seized under a void attachment, and sold by order of court as perishable, and the proceeds paid into the hands of the clerk; the defendant may claim and recover the money, but the plaintiff has no lien on it, though he may have obtained a valid judgment by *nil dicit*; and the court has no authority to order it paid over to them nor to the defendant's landlord for rent claimed, when there was no general lien on the goods for such rent. Goldsmith v. Stetson, 39 Ala. 183.

against the officer for an irregular sale, the burden of proof is on the plaintiff.¹ So a sheriff who levies an attachment on horses, and, under § 2529 of the (Ala.) code, sells them a week before the meeting of the court on account of the great expense of keeping them, does not become a trespasser *ab initio*, nor by any acts committed after the bringing of the action unless from the first intended.² So where property attached is sold by the officer upon the writ, in pursuance of a statute, and judgment is finally rendered in favor of the defendant; a refusal, on the part of the officer, to pay to the defendant the amount for which the property was sold, will not make him a trespasser *ab initio*, so as to render him liable in trover. The only proper action against the sheriff is for money, and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer.³ Nor can an officer be made a trespasser for attaching property, by any irregularity in the proceedings of another officer in selling the property upon execution.⁴ So an officer cannot be held liable, as a trespasser *ab initio*, for using personal property attached by him, unless the property have been injured, or used by him for his own benefit, or for the benefit of some one other than the debtor. As where an officer attached a horse, wagon, and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and they were not thereby injured.⁵ So where the officer, on the day subsequent to the attachment, was seen driving the horse and wagon in the highway, but it did not appear for what purpose; the jury may infer, from the time and circumstances, that he was removing them, for the purpose of securing them in a convenient place for keeping them while subject to the attachment.⁶

§ 17. It is in general provided by express statute, that the lien of an attachment shall cease, unless, within a certain time after judgment in the suit, execution be levied upon the property. (a) With reference to this statutory requirement, a deputy sheriff, in Maine, who has attached personal property, is bound to keep it thirty days after judgment, and to deliver it to the officer holding the execution at the expiration of that time, on demand,

¹ *Duncan v. Matney*, 29 Mis. 368.

² *Griel v. Hunter*, 40 Ala. 542.

³ *Abbott v. Kimball*, 19 Vt. 551.

⁴ *Paul v. Slason*, 29 Vt. 231.

⁵ *Ibid.*

⁶ *Ibid.*

(a) As to the distinction between attachment and execution, see *Thomson v. Baltimore*, 33 Md. 312; *Mixer v. Excelsior*, 65 N. C. 552.

though in the mean time he has ceased to be a deputy.¹ (a) So a sheriff, who has attached property by leaving a copy with the town-clerk, is bound to use ordinary care to see that it is forthcoming to answer the judgment;² although he took a receipt of the property from the nominal plaintiff and another.³ But in an action against an officer, for not keeping attached property so that it could be levied upon, it must appear from the declaration, that the property was charged in execution within thirty days from the rendition of judgment.⁴ And an attachment is not conclusive of the officer's obligation to levy an execution upon the property. Thus an officer, directed to "attach property or make no service," attached certain property, which was alleged in the return to belong to the debtor. In an action against him for not seizing it on execution, he may prove in defence that it was not the property of the debtor.⁵ Though the discharge of the execution, during the pendency of an action against a sheriff for not properly keeping property attached, is merely in mitigation, and nominal damages may be recovered.⁶ So the execution must be seasonably delivered, though the attached property has been stolen.⁷ And the officer, being responsible for the goods attached as well to the debtor as to the creditor, is not bound to deliver them to the latter, who has taken out execution, so that he may procure his execution to be levied upon them.⁸ So it is not the duty of the sheriff, who has attached property, to take out execution after judgment; and if, in such case, the plaintiff neglects to take out execution within a reasonable time, neither the sheriff, nor his sureties, will be liable for the forthcoming of the property attached.⁹ So (in Maine) a demand within thirty days from judgment is indispensable to fix his liability, unless special facts supersede its necessity. Thus, if the property is such as cannot be removed, but the officer neglects to file in the town-clerk's office

¹ *Smith v. Bodfish*, 39 Me. 136. See *Jones v. Hutchinson*, 43 Ala. 721; *Rodgers v. Bonner*, 45 N. Y. 379.

² *Smith v. Church*, 1 Will. 168.

³ *McKOrmsby v. Morris*, 3 Will. 417.

⁴ *McKOrmsby v. Morris*, 2 Will. 711.

⁵ *Canada v. Southwick*, 16 Pick. 556.

⁶ *Brown v. Richmond*, 1 Will. 583.

⁷ *Blake v. Kimball*, 106 Mass. 115.

⁸ *Blake v. Shaw*, 7 Mass. 505.

⁹ *Snell v. Allen*, 1 Swan, 208.

(a) The distinction is adopted in Massachusetts, that, where an *equity of redemption* is attached, it is the duty of the officer, upon receiving the execution within thirty days after judgment, to levy on the equity without particular instructions; but that it is otherwise where the land itself is attached. And where "all the right, title,

and interest" of the debtor, in land which proved to be under mortgage, was attached; it was held that the officer, having no instructions to levy on the equity, was not liable for neglecting to do so, unless he knew that he had attached an equity only. *Start v. Sherwin*, 1 Pick. 521.

a certificate, as the statute requires, or to keep actual possession ; he is released from liability to the creditor, if the latter neglect seasonably, on execution, to demand the property, although it had been sold pending his suit, on an execution in favor of another creditor.¹ So if, upon the sale of attached property upon a writ, the money received was put into the hands of the creditor, who, after obtaining judgment and taking out execution, refused to pay over the money to the deputy who had the execution, so that it could be applied thereon, and the execution was returned in no part satisfied : the lien obtained by the attachment is dissolved at the expiration of thirty days ; and a subsequent attaching creditor, who has obtained judgment and execution, becomes entitled thereto, and may maintain an action against the sheriff, if, upon committing the execution to him for service, the property is not found, or the avails of it applied thereon.² So, where an execution is delivered to an officer to serve, and no instructions are given him, he has a right to presume that it issued on the day when the judgment was rendered, and that he has the whole sixty days allowed by the execution for its service and return. Where, in such circumstances, an officer made demand on receiptors for personal property attached, within the time allowed by the terms of the execution for its service and return, but after the lien of the attachment had expired by the lapse of sixty days from the time of the judgment, the execution having been issued some time after judgment, but no information of that fact having been given to the officer ; held, he was not chargeable with official negligence. And this, although the debtor had become insolvent before judgment, and the execution could be collected only out of the attached property, and this was known to the officer.³ So, although the goods attached were delivered to a keeper, upon his accountable receipt, and by him restored to the debtor, and afterwards demanded of the officer upon execution, but not within thirty days from judgment ; the officer is not liable for not delivering them. But where the goods so attached were tools of trade, and the debtor brought an action of trespass against the officer for attaching them, and recovered judgment for their value ; and the plaintiff, having agreed to indemnify the officer, defended the action and satisfied the judgment : it was held that the officer was liable to the plaintiff for the goods, for by the judgment and satisfaction the property became vested in the plaintiff.⁴

¹ *Wetherell v. Hughes*, 45 Me. 61.

² *Morse v. Knowlton*, 5 Allen, 41.

³ *Dayton v. Lynes*, 31 Conn. 578.

⁴ *Howard v. Smith*, 12 Pick. 202.

§ 17 *a*. The levy of an execution upon property subject to the attachment of another creditor is void.¹

§ 18. Where an officer attaches property, and within thirty days after judgment receives the execution, but neglects to seize and sell such property; and, before the return-day of the execution, the debtor dies insolvent, and the officer returns the execution unsatisfied: he is liable to the creditor for his neglect.² But an officer, who delivers property, held by him under attachment, to an assignee in insolvency of the debtor, upon demand made while the assignment is in force, is not liable therefor to the attaching creditor, in case the proceedings in insolvency are subsequently annulled, for want of notice to the debtor of the petition by which they were instituted.³ (*a*)

§ 19. The same property may be successively attached by different creditors, (*b*) any one of whom may maintain an action against the sheriff for an injury occasioned by his default in relation to the property. (*c*) In general, the officer must first serve

¹ *Beers v. Place*, 36 Conn. 578.

³ *Penniman v. Freeman*, 3 Gray, 245.

² *Barnard v. Ward*, 9 Mass. 269.

(*a*) Where an officer has attached goods, and within thirty days after judgment seized them in execution, but failed to sell them; another officer may lawfully seize them, on another execution, in the hands of the bailee of the first officer, notwithstanding he had notice of the first seizure. *Warren v. Leland*, 9 Mass. 265.

(*b*) See *Noble v. Kelly*, 40 N. Y. 415; *Fockler v. Martin*, 32 Iowa, 117; *Gordon v. Jenney*, 16 Mass. 465. Where one officer, A, attaches property previously attached by B, another, and obtains an execution prior to that of B; he cannot take the property from B. *Benson v. Berry*, 55 Barb. 620.

Where A, an officer, is in possession of goods attached by him, a second attachment by B, another officer, is void, although the keeper of A agrees also to act as the keeper of B; and a third creditor, though with notice, may make a second valid attachment by delivering his writ to A. And if B sells the goods on execution, and pays off the debt of the first attaching creditor, B is liable to A for the full value of the goods. *Robinson v. Ensign*, 4 Gray, 300.

If, by virtue of one process, an officer arrests a man for crime, and rightfully seizes and takes money and other valuables from his person and holds them, to secure his safe keeping, and a new process comes into his hands, by which he is commanded to attach the property, it may be

thus attached. Otherwise, if the property is seized for the purpose of an attachment. But the presumption as to motive is in favor of the officer. *Closson v. Morrison*, 47 N. H. 482.

In reference to property taken on successive executions, where the sheriff is sued for selling the same personal property a second time, on a different execution, he is not estopped from giving evidence of fraud on the first sale. The sheriff, in making a sale, is but the instrument of the law; and the execution creditor, who had the property sold the second time, has a right to show that the first sale was collusive. *McMichael v. McDermott*, 17 Penn. 353.

A purchaser of personal property at an execution sale, who sells it to the wife of the debtor, leaving it in her possession, cannot maintain trespass, although the wife has not paid for the goods, against an officer seizing them under another execution against the debtor. *Waldron v. Haupt*, 52 Penn. 408.

When a sheriff has several executions, under one of which he has levied, and such levy is discharged by the plaintiff in execution or by payment, it is his duty to retain the property and sell it to satisfy the other executions. *Leach v. Pine*, 41 Ill. 66.

(*c*) See *Pailhes v. Thielen*, 1 La. Ann. 34; *Ross v. Weber*, 26 Ill. 221. A wrongful act of the officer may also avoid a prior

the writ first given him.¹ But in order to support an action, an attaching creditor must show that he has suffered *directly* from the act complained of. Thus the first of several attaching creditors obtained a judgment, in which were included illegal fees charged by the sheriff, to such amount, that the property attached was not sufficient to satisfy the executions, which issued on attachments prior to the plaintiff's, and his own also. The plaintiff brought an action on the case against the sheriff, to recover the amount of the illegal fees. Held, he could not recover.² But one creditor may maintain an action against the officer for a false return upon the writ of another, by which he is injured. Thus, where an officer, having attached an equity of redemption, sells it on execution, without having given notice of the *place* of sale, but falsely

¹ Moore v. Fitz, 15 Ind. 43.

² Turner v. Norris, 35 Me. 112.

writ as against a subsequent attachment. Thus where a deputy-sheriff, having in his hands a writ of attachment, by direction of the creditor's attorney, but not in his presence, alters the date and return-day of the writ, and attaches upon it property of the debtor; the writ is void as against a subsequent attaching creditor. Clarke v. Lyman, 10 Pick. 45.

If an officer attaches personal property, and it is subsequently taken from his possession by another officer, having another writ of attachment against the same debtor, and the property is sold, and its avails applied by the second officer upon the execution obtained in the second suit; judgment can be obtained for no more than nominal damages, in a suit brought in the name of the first officer against the second officer for such taking, if the first attaching creditor have neglected to take out execution within sixty days after final judgment in his suit. Nor can the plaintiff recover, upon the ground of any liability, on his part, to the debtor; since the act of the second attaching officer, in taking the property, was justifiable, so far as the debtor was concerned; and the debtor may have an action upon the case, in his own name, for any injury to the property itself, notwithstanding the special property and exclusive possession in the first officer might prevent the debtor from bringing trespass. Neither is the first officer, in such case, entitled to recover actual damages, to the time when the lien was abandoned, for the purpose of indemnifying him against the expenses, to that time, of the action of trespass; since it is very unusual, in any case, to give damages beyond the actual value of the property, as against a second

attaching officer, and the second attaching officer may require indemnity, if he please, before making the attachment; and, in such case, the costs recovered are the taxable costs, and not those between attorney and client, as allowed in some other cases of indemnity. Goodrich v. Church, 20 Vt. 187.

Where the goods of one are attached and taken by the officer on a writ against another, and afterwards again attached and taken in the same manner on a writ in favor of a different creditor; a release by the owner of all claim to damages, in consequence of the second attachment, in consideration of its relinquishment, has no effect upon a suit to recover damages occasioned by the first taking. Weston v. Dorr, 12 Shep. 176.

Where two officers at nearly the same instant took possession of property, each claiming to have attached it, and a contract was made between them to settle this dispute by a division of the property; it was held, that the contract was upon good consideration, and binding upon them, however it might be upon the creditors. Also, that such agreement (that each should have a moiety of the goods) would preclude them from afterwards raising the question of priority. And, though they in fact became tenants in common of the goods, as between themselves, yet, if one seized and sold the whole of the goods on his executions (both sets of creditors having taken the necessary measures to charge the goods in execution), the other officer can sustain trover, without showing that he in fact made the first attachment. Lyman v. Dow, 25 Vt. 405.

returns that he has given such notice, in consequence of which return a subsequent attaching creditor, being unable to sell the equity of redemption, is prevented from obtaining satisfaction of his demand; the officer is liable to such creditor in an action for the false return; and the measure of damages is the debt and interest, if the value of the property attached amounts to so much.¹

§ 20. If an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer, having a writ against the same debtor, cannot distinguish which have been attached; the latter officer may attach the whole.²

§ 21. Where a sheriff, to whom a writ of attachment is delivered, has directions from the creditor to attach certain chattels of the debtor, he is not bound to attach, on the same writ, other property, afterwards shown him by another creditor, with directions to attach the same on his suit.³

§ 22. If A's personal property is attached in a suit against B, and A sells and assigns his property to C while it is under attachment, an action of trespass, for the benefit of C, against the attaching officer, is properly brought in the name of A.⁴

§ 23. Where goods under attachment are assigned by the owner, and then again attached by the same officer, the delivery of the instrument of assignment is a sufficient delivery of the goods; and the assignee, having paid the claim of the first attaching creditor, may, upon giving the officer notice of such payment, and of the assignment, and demanding possession of the goods, maintain *replevin* therefor against him.⁵

§ 24. The liability of a sheriff, for the doings of his *deputy* (see chap. 29, § 21), in relation to an attachment, is limited to the acts of the deputy done while the relation between them continues. Thus, where the deputy of a former sheriff had attached goods, and afterwards — being the deputy of the present sheriff — refused to serve the execution upon them, the former sheriff was held not liable.⁶ But where a deputy sheriff, who had attached personal property, ceased to be a deputy before judgment, but the execution was put into his hands as coroner, with orders to satisfy it from the property attached; the coroner having neglected to

¹ Whitaker v. Sumner, 9 Pick. 308.

² Sawyer v. Merrill, 6 Pick. 478. See
Robinson v. Holt, 39 N. H. 557.

³ Goddard v. Austin, 15 Mass. 133.

⁴ Holly v. Huggefurd, 8 Pick. 73.

⁵ Whipple v. Thayer, 16 Pick. 25.

⁶ Blake v. Shaw, 7 Mass. 505.

make this application of the property, it was held, in an action against the sheriff for such neglect, that his return as coroner on the execution, so far as it related to a demand of the property, was admissible in evidence.¹ And the sheriff may be answerable upon a *contract* of the deputy in relation to property attached. Thus a deputy sheriff, having attached goods in a suit brought by F. against M., sold them on mesne process, pursuant to statute, and held the proceeds. M. died, and his administratrix, and F., and A., a creditor of F., executed an indenture, in which it was agreed that the deputy should pay (and he was therein directed and requested to pay) part of said proceeds to M.'s administratrix, and the residue to A., and that F.'s suit against M. should be dismissed. The deputy paid M.'s administratrix accordingly, and made part payment to A., and the suit was dismissed; but he neglected to pay A. in full. M.'s administratrix thereupon sued the sheriff, for the deputy's default in not paying over the balance of the proceeds. Held, that the sheriff was answerable to her for this default of the deputy.² So where a debtor and his attaching creditors agree in writing, that the goods may be sold by the deputy sheriff who attached them, either at public or private sale, at his discretion, and the proceeds held to respond the judgments, and the deputy sells the goods, partly at private and partly at public sale, and receives the money therefor, but neglects to apply it in satisfaction of executions issued on the judgments, and seasonably put into his hands; the sheriff is answerable.³

§ 25. A statute, which provides, that "actions of trespass and trespass on the case for damages done to real or personal estate" shall survive; is held to apply to an action of trespass on the case against a sheriff, for the fault of his deputy in not keeping property attached, and not delivering it to the officer holding the execution.⁴

§ 25 *a*. An action against a sheriff, for a wrongful attachment by his deputy, is not defeated, by proof that the plaintiff has claimed damages for the same act, in his answer to a suit by the attaching creditor against him, if it does not appear that the matter was adjudicated in that suit, or that evidence was introduced respecting it.⁵

§ 26. After an attachment of goods, and pending the action,

¹ *Smith v. Bodfish*, 39 Me. 136.

² *Mansfield v. Sumner*, 6 Met. 94.

³ *New Hamp. Savings Bank v. Var-*

num, 1 Met. 34.

⁴ *Dana v. Lull*, 21 Vt. 383. See *God-*
dard v. Hapgood, 25 Vt. 351; *Ely v. Hair*,
16 B. Monr. 236.

⁵ *Clapp v. Thomas*, 5 Allen, 158.

the defendant died ; his administrator took upon him the defence of the action ; judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. The latter included them in his inventory ; and, on settling his account of administration, the judge assigned to the widow all the effects that remained after paying funeral charges, &c. No representation of insolvency was made. Held, the officer was liable to the judgment creditor for the value of the goods attached.¹

§ 27. In regard to the seizure, either by attachment or upon execution, of property specially *exempted* from such liability ; (a) the

¹ *Rockwood v. Allen*, 7 Mass. 254.

(a) See *Spencer v. Long*, 89 Cal. 700 ; *Urquhart v. Smith*, 5 Kans. 447 ; *Daniels v. Hayward*, 5 Allen, 43 ; *Clapp v. Thomas*, 5 Allen, 158 ; *Rayner v. Whicher*, 6 Allen, 292 ; *Johnson v. Babcock*, 8 Allen, 583 ; *Greenleaf v. Sanborn*, 44 N. H. 16 ; *Reed v. Neale*, 10 Gray, 242 ; *Gibson v. Gibbs*, 9 Gray, 62.

Farming operatives are not a part of a debtor's immediate family. *M'Murray v. Shuck*, 6 Bush, 111.

Where charcoal in the pit was attached, a part of which was entirely completed, so as not to require any further attention or labor, and the residue of which had so far progressed in the process of manufacture as to have been entirely burnt to coal, although some labor and skill were still necessary in order to separate and preserve it properly ; it was held, that if a sheriff, holding a writ of attachment against the owner, saw fit to attach and take possession of the coal, and run the risk of being able to keep it properly, he had the right to do so. Also, that if any portion of the coal so attached were consumed through the want of proper care and attention on the part of the officer, the plaintiff could not sustain trespass against the officer to recover for such nonfeasance, and that the attaching creditor was not liable therefor, unless the omission were by his command or assent. *Hale v. Huntley*, 21 Vt. 147. See *Wilds v. Blanchard*, 7 Ib. 138.

Under (Mass.) Gen. Sts. c. 133, § 32, exempting from attachment the tools, implements, and fixtures necessary for carrying on the business of the debtor, not exceeding \$100 in value ; a clock, stove, screen, pitcher, and table cover, used by a milliner, should be exempted, if the jury find them to have been necessary and in use in her business. *Woods v. Keyes*, 14 Allen, 236.

Under Massachusetts Gen. Sts. c. 133, § 32, machines of simple construction, moved by the hand or feet, and used in the manufacture of boots, are exempt from attachment, although the owner employs a number of men under him in carrying on the business, by whom the machines are generally used. *Daniels v. Hayward*, 5 Allen, 43.

A violin and bow of a debtor, whose sole business is that of a musician, as a member of a military and quadrille band, and who obtains most of his support by playing upon his violin, are exempt from attachment, if the value of all his musical instruments is less than one hundred dollars. *Goddard v. Chaffee*, 2 Allen, 395.

If a debtor owns one cow, not subject to mortgage, and is in possession of another, which is mortgaged, the former is exempt from seizure on execution. *Tryon v. Mansir*, 2 Allen, 219.

Where one had a pair of oxen, in the keeping of A, to become A's when paid for, and another pair in his own possession ; held, the latter were not attachable. *Wilkinson v. Wait*, 44 Vt. 508.

A debtor was not estopped from claiming his right under (Vt.) Gen. Sts. c. 47, § 13, to "one yoke of oxen or steers as he may select," by a declaration made to the creditor prior to the attachment, that he had \$5000 of property, two yoke of oxen that could be attached, and that he should pay him soon ; nor did absence at the time of the attachment deprive him of his right under § 13, and its amendatory act of 1866. *Haskins v. Bennett*, 41 Vt. 698.

Under Massachusetts Gen. Sts. c. 133, § 32, a sewing machine of less than \$100 in value, owned by one engaged in the manufacture of ready-made clothing, and used by a person employed by him, is ex-

only exemption is by statute,¹ and the burden is on the officer to show that property was exempt.² If the articles are plainly distinguishable as tools and implements of the debtor's business, no demand or designation thereof at the time of the attachment is necessary, in order to maintain an action against the officer.³ It is held, that trover in common form will lie against a constable, for the seizure and sale by execution of chattels exempt from execution; and the plaintiff need only allege a right of property and possession, without a special allegation of the facts which must appear to entitle him to recover.⁴ But trespass cannot be maintained against an officer, for selling property on execution by virtue of an attachment, on the ground that the property was exempt from attachment and seizure, without showing that it was exempt at the time of the attachment.⁵ So where, in a foreign attachment, a person disclosed that he had in his hands certain specified articles belonging to the principal defendant, and was thereupon adjudged trustee, and an execution was issued against the effects of the principal in the hands of the trustee, and levied on these articles; held, that an action of trespass against the officer, on the ground that the articles were by law exempted from attachment and execution, would not lie.⁶

§ 28. With regard to the amount of *damages* to be recovered against an officer, on account of his default in relation to an attachment; in an action for neglecting to keep goods attached so that they might have been taken in execution, although the officer has neglected his official duty, yet if, in case he had adhered to it,

¹ *State v. Laies*, 46 Mis. 108.

² *Bonnell v. Bowman*, 53 Ill. 460.

³ *Woods v. Keyes*, 14 Allen, 236.

⁴ *Hawkins v. Pearce*, 11 Humph. 44.

⁵ *Greaton v. Pike*, 34 Me. 233.

⁶ *Haskell v. Sumner*, 1 Pick. 459.

empt from attachment, as necessary, if without it such business cannot successfully be carried on, although the owner does not know how to use it himself. *Dowling v. Clark*, 3 Allen, 570.

If a debtor, who has a larger quantity of any kind of provisions than the law exempts from attachment, set apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it when the officer is about to attach the whole; he cannot maintain an action against the officer who takes the whole. *Clapp v. Thomas*, 5 Allen, 158.

The burden of proof is on a plaintiff, who seeks to recover of an officer for attaching provisions, which he claims are

exempt from attachment, to prove facts which make them exempt. *Ibid.*

But whether the exemption is to be strictly or liberally construed, see *Guilford v. Deville*, 21 La. Ann. 686; *Shaw v. Davis*, 55 Barb. 389.

In Minnesota, where property is exempt, the officer may take it and make an inventory and appraisal. *Tultis v. Orthmeine*, 5 Minn. 377.

In New Jersey, where the value is clearly within the amount exempted, the officer is liable; if doubtful, he may take the property subject to an appraisal. *Bonnel v. Dunn*, 4 Dutch. 153.

An execution sale of property exempt from attachment, after notice that the owner claims an exemption, passes no title. *Johnson v. Babcock*, 8 Allen, 583.

the plaintiffs would have derived no benefit from their attachment, it is held that they are entitled to nominal damages only.¹

§ 29. The discharge of the execution, pending an action against a sheriff for not properly keeping property attached, is merely *in mitigation*, and nominal damages may be recovered.²

§ 30. The rights and liabilities of an officer are more generally brought in question in connection with the *execution*, which, unlike attachment, is a common-law process, than in any other form.³

§ 30 *a*. In addition to the ordinary liability of an officer to the parties to the suit, it is held, that, if the purchaser at a sale on execution loses his title to the property, in consequence of a neglect of the officer to comply with the requisitions of the law, he has a remedy by an action on the case against the officer. And, in such case, the sheriff is answerable for the default of his deputy.⁴ (*a*)

§ 30 *b*. Mere silence on the part of a sheriff, as to the existence in his hands of a prior lien on property sold in his presence, will not subject him to an action of deceit. Otherwise, if he does or says any thing intended or calculated to mislead a purchaser in this respect. And inquiring from the sheriff, and reliance on his information, as to the nature of the liens and levies of executions in his hands, on property offered for sale in his presence, is certainly the exercise of reasonable caution and diligence, as this is a matter peculiarly within his knowledge.⁵

§ 31. As in case of attachment, trover will lie against an officer, who takes, upon an execution, property exempted by law from

¹ *Rich v. Bell*, 16 Mass. 294. See 236; *State v. Romer*, 44 Mis. 99; *Vogel-*
Commercial v. Williams, 9 Greenl. 28. song *v. Beltzhoover*, 59 Penn. 57.

² *Brown v. Richmond*, 1 Will. 583.

³ See *Gamble v. Reynolds*, 42 Ala.

⁴ *Sexton v. Nevers*, 20 Pick. 451.

⁵ *Wicker v. Worthy*, 6 Jones, 221, 500.

(*a*) In Kentucky, the purchaser of property, sold under an illegal levy, the execution being returned satisfied, should have the proceedings quashed before he proceeds against the sheriff. *Hamilton v. Vail*, 2 Met. (Ky.) 511.

A defective return does not vitiate the title of an execution purchaser. *Stewart v. Houston*, 25 Ark. 311. Nor, in general, irregularity in the proceedings. *Blood v. Light*, 38 Cal. 649; *Wood v. Moorhouse*, 1 Lans. 405.

Where after a valid levy the defendant in execution had sold the property, a verdict on the trial of the right of property, justifying the officer in levying and

selling, is also a justification to the plaintiff in execution or other purchasers interfering in the defendant's sale. *Tucker v. Bond*, 23 Ark. 268.

Where, after a levy and before trial of the right of property, the property had been sold by the defendant in execution, a verdict, that "the execution is a lien upon and binds the property," is good, as being within a statute which provides, that, "if the jury find the goods and chattels to be the property of the defendant in the execution, the verdict shall as against the claimant justify the officer in selling such goods and chattels." *Ibid*.

attachment.¹ And both the officer and creditor are liable.² But not where there has been a *waiver* of the exemption.³ And the burden of proof is on the claimant.⁴ And where certain articles, to be selected by the owner, are exempted from execution, and an officer seizes and sells them, trespass will not lie against him, unless at the time of the levy, or within a reasonable time thereafter, the plaintiff selected the property and notified the officer thereof.⁵ (a)

§ 32. The levy, carrying away, and sale of a plaintiff's goods, although taking place upon different days, constitute but one act of trespass, and the plaintiff cannot be put to his election as to which he will proceed upon.⁶ (b)

§ 33. A sheriff may become a trespasser *ab initio* by any abuse of his authority under an execution. Thus the sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*.⁷ (c) So an officer who takes property on execution, but afterwards refuses the defendant his right of selection and appraisal under the exemption acts, becomes a trespasser *ab initio*; although evidence that the debtor had other property, exceeding that amount in value, which he fraudulently withheld from levy, may be given in mitigation of damages.⁸ But an officer cannot be charged as a trespasser, by going behind the judgment on which the execution

¹ Sanborn v. Hamilton, 18 Vt. 590. See Bonnel v. Dunn, 5 Dutch. 435; Burns v. Harris, 67 N. C. 140; Alvord v. Lent, 23 Mich. 369; Tillotson v. Wolcott, 48 N. Y. 188.

² Bonnel v. Dunn, 4 Dutch. 153.

³ Twinam v. Swart, 4 Lans. 263; Berland v. O'Neal, 22 Cal. 504.

⁴ Tuttle v. Buck, 41 Barb. 417.

⁵ Frost v. Shaw, 3 Ohio, N. S. 270. See Nash v. Farrington, 4 Allen, 157; Eager v. Taylor, 9 Allen, 156; Carruth v.

Grassie, 11 Gray, 211; Kyle, &c., 45 Penn. 353; Pittman's, &c., 48 Penn. 315; Strouse v. Becker, 44 Penn. 206; Lancks's, &c., 44 Penn. 395; Wilcox v. Hawley, 31 N. Y. (4 Tiff.) 648; Smith v. Emerson, 43 Penn. 456; Smith v. Turnley, 44 Geo. 243.

⁶ Browning v. Skillman, 9 Zab. 351.

⁷ Smyth v. Tankersley, 20 Ala. 212.

⁸ Wilson v. Ellis, 28 Penn. 238; Freeman v. Smith, 30 Ib. 264.

(a) In an action of trespass, for entering the plaintiffs' store and carrying away their goods, the defendant pleaded, that the goods were the property of others, against whom he as sheriff had executions, which he levied on those goods, and under which he sold them. The plaintiffs took issue on the plea, and the plea was sustained by proof, except as to some articles specified among others in the declaration, and as to which there was no proof of the value, ownership, or taking. Held, that the defendant was entitled to a general verdict. Emanuel

v. Cocke, 6 Dana, 212. See Lovier v. Gilpin, Ib. 321.

(b) An entry, by a creditor of A, upon land devised to A in fee, but subject to a trust for the benefit of B during the life of A, which entry is made to effect a levy of an execution against A, but without retaining or otherwise interfering with the possession; is not a trespass against A. Butterfield v. Haskins, 33 Me. 392.

(c) And, if he has sold the property and received the money, the owner may waive the tort, and bring assumpsit for the money. 20 Ala. 212.

is founded, although in part illegal. Thus, where the judgment was for the price of goods, part of which had been illegally sold, trespass will not lie against an officer, for applying the proceeds of sales of goods attached on such execution, to a greater amount than was due for the goods legally sold and the costs of the suit; neither is the officer a trespasser *ab initio*.¹ Nor will an action lie for a trespass consented to by the debtor, though the proceedings were irregular.²

§ 34. In general, the officer may lawfully take property in possession of the debtor or his agent.³ So one who suffers his goods to be so mingled with those of another, that the sheriff cannot distinguish them, can maintain no action until after a proper demand and refusal.⁴ But, on the other hand, an execution only justifies the sheriff in taking the property of the defendant named therein, which is liable to be levied on and sold as his property.⁵ An officer is not authorized, by a precept against one person, to take and sell the property of another, unless he has so conducted himself as to forfeit his legal rights; but he must ascertain at his own risk (being entitled to require indemnity in doubtful cases), that the property to be taken and sold is the property of the person against whom he has a precept.⁶ Thus where an officer had two executions against a father and son, and another against the father alone, and he levied the executions on three horses belonging to the son, as the property of the father, and an offer was made to pay the executions against the son before the day of sale, and the officer refused to receive the money and proceeded to sell the horses; held, the officer became a trespasser *ab initio*.⁷ So the levy of an execution against A, upon land in the possession of B, is a trespass, for which the plaintiff in the execution, his attorney, who orders the levy, and the officer making it, are liable, unless they show that the land belonged to the defendant in the execution, and was subject to levy.⁸ And trespass will lie against the sheriff, if his officer take the goods of A on a *fi. fa.* against B.⁹ And a person whose property is seized, in the hands of another, is not bound to come forward and claim the property and try the right, but may waive that remedy, and sue the officer and the plaintiff in a separate action.¹⁰ So an entry upon the land of a stranger to the pro-

¹ Walker v. Lovell, 8 Fost. 138.

² Barnes v. Rogers, 23 Ill. 350.

³ Bickerstaff v. Doub, 19 Cal. 109.

⁴ Smith v. Welch, 10 Wis. 91.

⁵ Hoyt v. Van Alstyne, 15 Barb. 568.

⁶ Lothrop v. Arnold, 25 Me. 186.

⁷ Parish v. Wilhelm, 63 N. C. 50.

⁸ McDougald v. Dougherty, 12 Geo. 613.

⁹ Ackworth v. Kempe, 1 Doug. 40.

¹⁰ McKay v. Treadwell, 8 Tex. 176.

cess, under a writ of possession, will not oust him of his possession or right of possession, but the entry and every subsequent act done under it will be a trespass.¹ And a party does not lose his claim for wrongful levy of an execution, by failing to proceed against the officer for a previous attachment of the same property. Thus where the plaintiff suffered a pair of oxen belonging to him to be attached, with cattle of a stranger, on a writ against the stranger, without giving the officer notice of his title; and, after the lien by attachment had terminated, and the oxen were separated from the other cattle, the officer seized them on an execution against the stranger: held, the plaintiff might maintain trespass against the officer for such seizure, and this without any special notice that the oxen were his property, and without a previous demand.²

§ 34 *a*. Where an officer is sued for the wrongful seizure and sale of property taken under an execution, it is necessary for him to produce the judgment and execution, to show that the relation of debtor and creditor existed; and also to show his authority for seizing the property, before he can be heard to allege fraud in its transfer.³

§ 35. In answer to an action for taking the apparent property of one not a party to the execution, the officer must prove the judgment.⁴ So in an action of trespass against a sheriff for levying upon property, claimed by a person not the execution debtor, if the sheriff relies in defence upon a fraudulent sale to the plaintiff in the action of trespass, he must show that the plaintiffs named in the execution were creditors of the execution debtor, and that the present plaintiff was a fraudulent purchaser.⁵ Thus, in an action by an assignee of property, assigned for benefit of creditors, against a sheriff, for an alleged conversion, evidence of fraud in the assignment, and of the attachment, judgment, and execution, under which the defendant justified, is competent evidence in defence.⁶ And although, in a special plea of justification, the officer need not plead the judgment; yet he ought to describe the execution with sufficient certainty, stating out of what court or by what authority it issued, and giving such information in the defence, as may show the plaintiff what is relied on.⁷ (*a*)

¹ *Warren v. Cochran*, 10 Fost. 379.

² 16 Pick. 19.

³ *Pemberton v. Smith*, 3 Head, 18.

⁴ *Bickerstaff v. Doub*, 19 Cal. 109; *Walker v. Woods*, 15 Cal. 66.

Knox v. Marshall, Ib. 617.

⁵ 11 Ill. 610.

⁶ *Jacobs v. Remsen*, 35 Barb. 384.

⁷ *Cook v. Miller*, 11 Ill. 610. See

(*a*) In an action against a constable, for taking the property of the plaintiff upon three executions against a third person, the constable filed a special plea, in which he set up an indemnifying bond, executed by the plaintiffs in the execu-

§ 36. It is the duty of a sheriff, in good faith, to levy on so much of the property of the defendant, if to be had, as will in all reasonable probability yield, at a public sale, the necessary amount of money.¹ (a) The mere insolvency of a party is not a sufficient defence.² And the return must show want of property in all the defendants.³ But the officer is not liable, unless he knew of property or facts which required a search.⁴ In regard to the

¹ French v. Snyder, 30 Ill. 339; Governor v. Powell, 9 Ala. 83; 8 Ib. 625. See Green v. Jones, 39 Geo. 52; Lindsey v. Cook, 40 Geo. 7; Rogers v. Silas, 42 Geo. 541; Lowe v. Lowby, 49 Mis. 71; Ross v. Cave, 49 Mis. 129.

² Griswold v. Chandler, 22 Tex. 637.

³ Hassell v. Southern, &c., 2 Head, 381.

⁴ Taylor v. Wimer, 30 Mis. 126. See Stevenson v. Judy, 49 Mis. 227.

tions. Held, the plea need not set out the judgments on which the executions issued. Davis v. Davis, 2 Gratt. 363.

Where an execution issues against A, and is levied *bonâ fide* on property in the possession of B, on the allegation that the property is really in A, the action of replevin will not lie against the sheriff. Carroll v. Hussey, 9 Ired. 89.

In an action for the recovery of specific personal property and damages for its detention, the defendant answered, that the property was seized by him, as sheriff, on an execution against one J. R.; that a trial of the right of property of J. H. R. thereto was had under the statute, before the justice and jury, which resulted in a verdict and judgment in favor of the claimant, J. H. R.; that, within three days after said trial, the plaintiff in execution executed an undertaking to the said J. H. R., in strict compliance with § 428 of the code, and delivered the same to the defendant, as sheriff, and it was by him tendered to the claimant, who declined to receive it, and thereupon brought the present suit, said property being still in the possession of the defendant as such sheriff. On demurrer, the answer was held a bar. Ralston v. Oursler, 12 Ohio, N. S. 105.

In trespass, for breaking and entering the plaintiff's close and stable, and taking away two horses, the plea was, that an execution against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution debtor and were subject to the execution; that the sheriff by virtue of the execution, and the defendants by his command, broke and entered into the close and stable, and took the horses, &c. Replication, that the horses did not belong to the execution debtor, but to the plaintiff. Held, on general demurrer, that the replication was sufficient. McGee v. Givan, 4 Blackf. 16.

(a) In reference to the *time of levy*; a sheriff, directed by a writ to put the plaintiff forthwith in possession of certain property, at first, though present on the premises, and requested so to do by the plaintiff, refused, but at a subsequent day delivered the possession as required. Meanwhile, the tenants had done divers injuries to the premises. Held, the misconduct of the sheriff must be presumed wilful, and he must respond for these injuries in damages, however remote. Chapman v. Thornburgh, 17 Cal. 87.

In an action against a sheriff, for neglecting to levy on real estate, and to return the execution in proper time; where he was not requested by the creditor to levy on real, and had levied on personal estate, and, before the levy was completed, the real estate had been attached by another creditor, and there was no other attachable property; it was held that the officer was not bound to levy the execution upon the real estate, until a sufficient time had elapsed to sell the personal property; and also that the defendant was liable only in nominal damages, for the neglect of the deputy to return the execution within its life. Bank, &c. v. Baldwin, 31 Vt. 311. See Dayton v. Lynes, 31 Conn. 578; Davidson v. Waldron, 31 Ill. 120. As to the *place of sale*, see Sheppard v. Shelton, 34 Ala. 652; Williams v. Ivey, Ala. S. C. 220.

A sheriff neglected to sell property on the day advertised, and soon after a claim was interposed by a third party. A rule having been served upon the sheriff, to show cause why he should not pay the amount of the execution to the attorney of the plaintiff therein; held, the sheriff was not then liable to attachment, it not being certain that the plaintiff had suffered any injury; but the rule should be kept open until the disposition of the claim. Hackett v. Green, 32 Geo. 512. See Blivins v. Johnson, 40 Geo. 297.

amount taken, the test to be applied in scanning the conduct of the sheriff, when he has made an insufficient levy on land, is not the opinion of witnesses, or the estimated cash value of such lands in the neighborhood, but the price at which such lands usually sold at a sheriff's sale, or were actually sold on the execution in question. And in an action for failing to levy upon a sufficiency of property to satisfy the judgment, the measure of damage is the injury sustained. The value of the property levied on should be equal to the debt, making a proper allowance for depreciation in price, the effect of a forced sale, as also costs and other incidental charges.¹ The officer, in respect to the amount, must exercise a sound discretion; and, it seems, if the quantity seized will, in all reasonable probability, be sufficient, he will not be liable, although it prove insufficient. So, if it far exceeds a sufficient amount, he will not be liable for an excessive levy.² (a) If he levies on lands which ought, in the estimation of prudent individuals, to produce sufficient, but do not, this furnishes no reason to charge the sheriff, unless actual injury has resulted to other parties from his mistake. And the sheriff exercises all the diligence required by law of him, when, after an unproductive sale of land so levied on, he makes an immediate levy on other property of value sufficient to satisfy the execution, although that cannot be sold until after the return-day, and is in fact replevied.³ But when a sheriff justifies his refusal to make a levy, or his restoration of the property after a levy has been made, upon the ground that the defendant had *transferred* the property; he assumes the burden of proving that the transfer was *bonâ fide* and effectual in law for the purpose for which it was made.⁴ And an officer is liable to the execution creditor for not levying in the precise manner which he prescribes. Thus the plaintiff, having two executions against the same defendant, one of which was secured by an attachment and the other not, delivered them at the same time to an officer, with directions that, in case the defendant should offer by way of set-off an execution sued out by him against the plaintiff, the officer should set it off against the plaintiff's execution, which was not secured; but the officer set it off against the other. Held, the officer was liable to

¹ Griffin v. Ganaway, 8 Ala. 625.

³ Powell v. Governor, 9 Ala. 36.

² Commonwealth v. Lightfoot, 7 B. Monr. 298; 30 Ill. 339.

⁴ Smith v. Leavitts, 10 Ala. 92.

(a) But if through want of ordinary care, skill, or judgment, he makes an excessive levy on property of an extra value on account of some peculiar quality, he is liable. Vance v. Vanarsdale, 1 Bush, 504.

the plaintiff for thus defeating his attachment.¹ So where there are joint parties, the officer must obey his instructions as to which of them shall be called upon.² So also with regard to the selection of property.³ So, where the plaintiff and his attorney are present on the day of sale, and direct the officer to sell the property according to the statute, and for cash; the officer is bound to follow these instructions, and has nothing to do with former conversations or arrangements between the parties.⁴ (a) But, in the absence of express instructions, the officer is not bound to adopt the most beneficial mode of levying an execution. Thus a creditor attached the interest of his debtor in real estate, consisting of a homestead and of a wood-lot mortgaged to different persons. The debtor subsequently mortgaged the homestead to W., and another creditor then attached the interest of the debtor in the real estate; and the executions of both creditors were delivered to the officer at the same time. The officer levied the first creditor's execution on the equity of redemption in the wood-lot, and in consequence the second creditor's execution remained unsatisfied. Held, the officer was not liable to an action for so doing.⁵ And a direction to attach real estate upon the writ does not constitute a request to levy the execution upon the debtor's real estate, if one should be issued.⁶ (b)

¹ *Coggeshall v. Varnum*, 19 Pick. 422. See *Lashley v. Cassell*, 23 Ind. 600; *Cattlett v. Gilbert*, Ib. 614; *Stockwell v. Byrne*, 22 Ib. 6. As to a division of the property, *West v. Cooper*, 18 Ind. 1; *Benton v. Wood*, 17 Ind. 260.

² *Root v. Wagner*, 30 N. Y. (3 Tiff. fa.) 9.

³ *Childs v. Dilworth*, 44 Penn. 123.

⁴ *Walworth v. Readsboro'*, 24 Vt. 252.

⁵ *Lafin v. Willard*, 16 Pick. 64.

⁶ 31 Vt. 311.

(a) If a writ, issued from a court of competent authority, has been superseded, after it has come into the hands of the proper officer, it is the duty of the party against whom it issued, to have the officer notified of the *supersedeas*, in such manner that he will be protected in refusing to execute the writ. And an officer, having a valid execution in his hands, must be served with a written order from competent authority, requiring him to suspend all action upon it, before he can be held liable for obeying its mandate. *Payne v. The Governor*, 18 Ala. 320.

(b) The sheriff has no right to allow the plaintiff's attorney to take complete control of the proceeds of an execution sale.

If he do this, he will be held to a rigid accountability.

If the lands decreed to be sold in a partition suit are sold, and the whole transaction connected with the sale car-

ried on by the plaintiff's attorney with the assent of the sheriff, he will be deemed the sheriff's agent, and the sheriff will be held accountable for all moneys received by the attorney in the transactions. *Van Tassel v. Van Tassel*, 31 Barb. 439.

In case of alleged *waiver* and *ratification* by the creditor, by receipt of the proceeds; the question is for the jury. *Brainerd v. Dunning*, 30 N. Y. (3 Tiffa.) 211. See *Meyer v. Amidon*, 45 N. Y. 169.

In reference to a *valuation* by the officer, see *Harrison v. Harwood*, 31 Tex. 650.

As to a sale of land in parcels, *Piel v. Brayer*, 30 Ind. 332; *Burneister v. Dewey*, 27 Iowa, 468; *Winters v. Burford*, 6 Cold. 328.

A sale of lands was held illegal where the return showed, that, in the absence of the officer, and of any bidders, the

§ 37. We have already (chap. 29) considered the duty of an officer as to the *return* of process served by him. With regard to the return of *executions* it is held, that, when a sheriff neglects to return an execution, the plaintiff has a *prima facie* right to recover the amount thereof, in an action against the sheriff; but the sheriff may show, in mitigation, that the defendant had no property subject to levy, though not that he now has sufficient to pay it.¹ So, although the creditor may have sustained no damage in consequence of the neglect, he is entitled to nominal damages; for, where there is a neglect of duty, the law presumes that damages have been sustained.² (a) And, in an action against a sheriff for a false return on an execution, where there is property enough to levy it on, the damage to be recovered is the amount of the execution. He will not be permitted to prove that a less sum was due on the judgment.³ So, in a proceeding against an officer for failure to return an execution, a tender by him of the amount thereof, after notice and before judgment, is no ground of defence against the motion. The failure to return the execution according to law fixes the liability of the officer, which cannot be discharged by a tender.⁴ So, where the return-day of an execution levied on land falls within the time allowed by law for recording the execution in the registry of deeds, if the officer does not either cause it to be duly recorded, or return it into the clerk's office on or before the return-day, or deliver it to the creditor in season to be put upon record; he will be liable to the creditor for the value of the land lost by his neglect.⁵ But the law does not require the sheriff of another county, to whom an execution is issued, to return it either in person or by deputy. If he deposits it in the post-office, properly directed, in time to reach the clerk of the court from which it issued by the return-day, it is sufficient.⁶

§ 38. If a sheriff sell goods upon an execution without legally advertising the sale, and return that he advertised and sold them.

¹ Ledyard v. Jones, 13 Seld. 550. See Noble v. Whetstone, 45 Ala. 361.

² Laffin v. Willard, 16 Pick. 64.

³ Bacon v. Cropsey, 3 Seld. 195.

⁴ Chaffin v. Crutcher, 2 Sneed, 360.

⁵ M'Gregor v. Brown, 5 Pick. 170.

⁶ Underwood v. Russell, 4 Tex. 175.

sale was adjourned by the plaintiff's attorney, by authority of the officer. Wolf v. Van Metre, 27 Iowa, 348. See Perkins v. Proud, 62 Barb. 420. See further, as to mode of sale, Goode v. Rawlins, 44 Geo. 593; Wood v. Morehouse, 45 N. Y. 368; Tiffany v. St. John, 5 Lans. 153; Dryfus v. Dridges, 45 Miss. 247; State v. Byrd,

42 Geo. 629; Losee v. Lacey, 23 La. Ann. 287; French v. Edwards, 13 Wall. 506.

(a) A sheriff is not liable to be *amerced* for not returning an execution according to law. Ritter v. Merseles, 4 Zabr. 627. See Young v. Donaldson, 2 Heisk. 52.

according to law, he will be liable to an action on the case for a false return, but the judgment debtor cannot maintain trover for the goods.¹

§ 39. A sheriff is only required to use ordinary diligence in the execution of process. Hence, if a debtor has property, and the sheriff, exercising ordinary diligence, which is a question of fact for the jury, has no notice of it; he is not liable on a return of *nulla bona*.²

§ 40. The liability of an officer, in reference to the payment of money received by him from a sale on execution, has often come in question. The subject, however, is usually regulated by statutes; which enforce this important duty by a rigid forfeiture for its violation.³ (a)

§ 40 a. Money collected *colore officii* by a sheriff cannot be withheld. Having treated the process as valid, for the purpose of collecting the money, he cannot treat it afterwards as invalid and withhold the money.⁴

§ 40 b. A rule *nisi* was granted and served upon an officer, requiring him to show cause why he should not pay to the plaintiff or his attorney certain sums of money which he had collected, or be attached as for a contempt. In answer the officer admitted that he had collected the money, but that in a few days thereafter he proposed to borrow the money from the plaintiff, and the plaintiff verbally loaned the same to the respondent, at the rate of ten per cent per annum, which the respondent agreed to give. Held, this answer was too vague and uncertain; and a rule absolute was granted, requiring the officer to pay over the money at once.⁵

§ 41. It is held, that a sheriff is not bound to collect an execution, and pay the amount to the plaintiff, before the return-day of the writ.⁶ (b) So in Massachusetts it is held, that a sheriff is

¹ *Livermore v. Bagley*, 3 Mass. 487.

² *Barnes v. Thompson*, 2 Swan, 313.

³ See *Bizzell v. Hardaway*, 42 Ala. 471; *Leonard v. Johnson*, 43 Ala. 596; *Smith v. Pike*, 44 Vt. 61; *Cockerham v.*

Baker, 7 Jones, 288; *Alleghany, &c.*, 48 Penn. 328; *Morse v. Knowlton*, 5 Allen, 41.

⁴ *Graydon v. Stone*, 1 Edm. Sel. Cas. 221.

⁵ *Albert v. Howell*, 32 Geo. 548.

⁶ *State v. Mann*, 13 Ired. 444.

(a) No action lies in favor of an execution debtor against the sheriff, for taking money from the debtor, with a promise either to return it or apply it to the execution, and failing to do so. *Henry v. Rich*, 64 N. C. 379.

(b) In general, the sheriff is bound to pay over money at the return-day, though not demanded; and before, if demanded. *Dale v. Birch*, 3 Camp. 347; *Rogers v. Sumner*, 16 Pick. 387.

If a deputy receive the debt and cost, and stay service, the sheriff is immediately liable for the amount, without demand. *Green v. Lowell*, 3 Greenl. 378.

If a sheriff pays money raised under a *fi. fa.* to the plaintiff in the execution before the return-day, or permits him to purchase the goods, and the writ is set aside by the court: he is liable to subsequent execution creditors; and a decree of the court, sanctioning the payment,

not obliged to bring money into court which he has received on execution, but may retain it till demanded. (a) But, after demand and refusal, whether before or after the return-day of the execution, he is liable to the creditor's action for the money, and interest at the rate of 30 per cent.¹ (b) And an action lies, though there are conflicting claims to the money, and the creditor refuses to give the officer a bond of indemnity. But not, in such case, in the absence of any sinister motive on the part of the officer, for the statutory penalty of five times the lawful interest, imposed for *unreasonably* neglecting or refusing to pay over money.² So the (California) statute (April 29, 1851) does not extend to the case of a well-founded doubt on the part of the sheriff, whether the party demanding money raised on an execution is lawfully entitled to it, but only to cases of wilful delinquency. He is not compelled to decide, at the risk of being ruled against, whether a party claiming under an assignment from the plaintiff has really a valid assignment.³ So, where a sheriff has collected money on execution, and is notified not to pay it over to the plaintiff, and a motion for that purpose is made in court; he is not liable to the plaintiff for the penalty of five per cent per month, for not paying him the money, until the decision of such motion.⁴ But if he refuse to pay over the money, because, by direction of the debtor, he has attached it, on a writ in favor of the debtor against the creditor, he is subject to the statute penalty.⁵ So when a sheriff has collected money on execution, it is his duty to pay it over to the judgment creditor or his attorney, notwithstanding the pendency of a motion to discharge an attachment of the debtor's prop-

¹ Wakefield v. Lithgow, 3 Mass. 249; Rogers v. Sumner, 16 Pick. 387. See Church v. Clark, 1 Root, 303; Nelms v. Williams, 18 Ala. 650.

² Rogers v. Sumner, 16 Pick. 387.

³ Wilson v. Broder, 10 Cal. 486.

⁴ Conway v. Campbell, 11 Mis. 71.

⁵ Thompson v. Brown, 17 Pick. 462.

will not protect him, where the money has not been paid into court. Williams's Appeal, 9 Barr, 267.

(a) In this State, special provision is made for the application of surplus moneys arising from an execution sale to other executions placed in the hands of the officer for that purpose. In an action against a sheriff, for not paying over money collected on an execution in favor of the plaintiffs, the declaration alleged, that the execution was delivered to the defendant; that he ought to have satisfied it out of moneys of the debtor, arising from the sale of his property, made by the defendant, which property was attached by the defendant on the writ; and that the moneys

were more than sufficient to satisfy the execution, after paying off all previous attachments. Held, that, in order to bring the case within the Stat. 1804, c. 83, § 6, it should have been averred, that the sale was made by the defendant *virtute officii*, and that the plaintiff's execution was delivered to the defendant, before he had paid over the surplus money to the debtor. Wheeler v. Willard, 14 Pick. 486. See Buckmaster v. Drake, 5 Gilm. 321.

(b) The *Statute of Limitations* dates from demand. Keithler v. Foster, 22 Ohio St. 27.

But a demand will be presumed to have been made at the expiration of the time limited for bringing an action. Ibid.

erty.¹ The very strict rule has also been applied, that where an officer, who had collected money upon execution, paid it to the creditor's attorney of record in the action, but whose power had been revoked by the creditor before the execution was delivered to the officer; this was no legal discharge of the officer.²

§ 42. It has been held that a sheriff, who receives money on an execution *after the return-day*, and fails to pay it over, is not liable for the failure in his official capacity; but he is liable to the plaintiff in an action for money had and received.³ But a sheriff, by whom an execution has been levied on personal property whilst the execution is in force, may sell after the return-day of the writ, and, having the power to sell, he may receive the money in satisfaction of the execution, without a sale, and, by such receipt, and failure to pay it over to the plaintiff, subject his securities to liability therefor.⁴

§ 43. If money is collected on execution, and held by a deputy sheriff, who has since ceased to hold the office and has left the Commonwealth; a demand upon the sheriff, under oral authority from the plaintiff, is sufficient to render him liable for the money.⁵ So in an action against the sheriff for money collected, the return on the execution of the amount collected, made by his deputy, is held conclusive in favor of the plaintiff.⁶ So in an action against a sheriff, for the default of his deputy in not paying money made by him on an execution, which he returned satisfied, and on which he sold chattels alleged by him in his return to have been the property of the execution debtor; the sheriff cannot defend, by showing that the chattels were the property of a third person, who forbade the sale, and directed a suit to be brought against the deputy for a trespass, without evidence that such suit was commenced, and a judgment recovered against the deputy. And it is doubted whether proof of such judgment would constitute a defence.⁷ But, on the other hand, it is held, that, in a suit for not paying money, the sheriff may show, even in contradiction of his return, that the goods belonged to a third person, to whom he is liable; or that the judgment debtor has become bankrupt, and the money belongs to his assignees.⁸ And where a sheriff sells property under a junior execution, having an elder one in his hands at

¹ *Paige v. Willet*, 38 N. Y. 28.

² *Parker v. Downing*, 13 Mass. 465.

³ *Hamilton v. Ward*, 4 Tex. 356. But see *James v. Yates*, 3 Met. (Ky.) 343.

⁴ *Evans v. Governor*, 18 Ala. 659.

⁵ *King v. Rice*, 12 Cush. 161.

⁶ *Sheldon v. Payne*, 3 Seld. 453.

⁷ *Weston v. Ames*, 10 Met. 244.

⁸ *Brydges v. Walford*, 6 M. & S. 42; 2 Greenl. Ev. § 588, n.

the time, he is bound to apply the proceeds to the satisfaction of the senior *fi. fa.*, though between the times, when they were respectively received by him, the debtor sold property, which the senior creditor declined to allow the sheriff to levy upon.¹ (a)

§ 44. Money in the hands of a sheriff, collected under execution, when not more than sufficient to satisfy the debt and costs, is the money of the plaintiff in execution; and the extent of the sheriff's lien upon the fund, in case of a controversy, must be settled between him and the plaintiff. And when the money collected is not enough to satisfy the debt and lawful costs, and the sheriff retains more than his lawful fees; the defendant in execution cannot, after paying to the plaintiff the balance of his debt, allowing the sum appropriated by the sheriff, recover from the sheriff the amount unlawfully retained by him.²

§ 45. Though a sheriff goes out of office before completion of the execution of process, he is still liable to pay over the money collected on execution, and the interest provided in such case by statute, on motion.³ And where a sheriff, after his term of office had expired, appointed an agent to attend to all the business relating to the office, with full authority to pay out, or to refuse to pay; it was held, that a demand from such agent, of money collected, was a sufficient demand to charge the sheriff.⁴

§ 45 a. An officer who sells an equity of redemption upon execution, and holds the surplus, after satisfaction thereof, upon a second attachment, which has since failed, is not liable to the judgment debtor for such surplus until he has received notice of the dissolution of the second attachment; and therefore the Statute of Limitation does not begin to run until that time.⁵ (b)

¹ *Furman v. Christie*, 3 Rich. 1.

² *Chenault v. Walker*, 22 Ala. 275.

³ *Buckmaster v. Drake*, 5 Gilm. 321.

⁴ *Alexander v. Hancock*, 2 Rich. 100.

⁵ *King v. Rice*, 2 Cush. 161.

(a) A sheriff, having two executions, sold personal property for a sum that was insufficient to satisfy the first, and made a levy on real estate for the balance; and subsequently the defendant gave to the sheriff a sum of money, with directions to pay it to the creditor in the junior execution. Held, the sheriff could not levy on the money under the first execution; and was justified in returning that it was made on the second, and paying it to the plaintiffs therein. *Rudy v. Commonwealth*, 35 Penn. 166.

(b) The sheriff levied a *fi. fa.* in time to raise the money before the return-day, and turned over the execution to his suc-

cessor in office, in whose hands the sale was arrested by an affidavit of illegality. Held, the first sheriff had done right, and should not be ruled against for the money. *Lauham v. Vaughan*, 26 Geo. 358. See *Alleghany, &c.*, 48 Penn. 328; *M'Kay v. Thorington*, 15 Iowa, 25.

It is the duty of a deputy to pay over to the principal sheriff all the moneys collected by him as such, within a reasonable time, and, if he fail to do so, an action may be maintained against him without a previous demand. *Nelms v. Williams*, 18 Ala. 650.

And the rule applicable to common-law actions against the sheriff, for failing to

§ 46. An officer, having personal property in his possession, by virtue of an execution against the owner, may maintain trespass,

pay over money collected by virtue of his office, applies, where the deputy is sued by the principal sheriff for a similar default. *Ibid.*

Where a judgment has been recovered against a sheriff, for the default of his deputy in failing to pay over money received on an execution, the sheriff may, though he has discharged the judgment, maintain a motion against the deputy and his sureties, for the amount of the judgment recovered against him. *Weaver v. Skinner*, 4 Gratt. 160.

But where a sheriff has satisfied a judgment, recovered against himself for the default of his deputy, in failing to pay over money received on an execution; he can, upon a motion against the deputy and his sureties, recover only the amount of such judgment, and not the aggregate amount of debt, interest, and costs, with interest thereon. *Ibid.*

A statute which provides that, where a sheriff has paid or is liable to pay money for the default or misconduct of his deputy, he may, by motion, recover judgment against the deputy and his sureties, upon satisfactory proof, &c., does not change the common-law principles applicable to such cases; and therefore, if the insufficient return is in the handwriting of the sheriff, though signed by his deputy, there is no "default or misconduct" on the part of the deputy. *Cate v. Howard*, 1 Swan, 15.

The fact, that an execution issued for a less sum than the amount of the judgment, constitutes no defence for a sheriff who has collected it, either by himself or his deputy, in an action for not paying it to the creditor. So, although the action was not commenced for the default, until after both the sheriff and deputy had gone out of office. *Coburn v. Chamberlin*, 31 Vt. 326.

In Georgia, when a sheriff neglects to levy a *fi. fa.* until too late to make the money for the next term, and an injunction is granted, which has no merit in it, and so does not, in fact, prevent the collection of the *fi. fa.*; he may be ruled for the money. *Caruthers v. Sprayberry*, 26 Geo. 437.

In Kentucky, ten per cent given against a sheriff who fails to pay a debt to a county creditor, when he should have done so, is not an annual rate of interest, but is given out by way of damages. *Terrill v. Cecil*, 3 Met. 347.

Upon motion to hold a sheriff liable

for a county debt which he should have paid to the county creditor, and has not, judgment may be rendered by default, but it is incumbent upon the plaintiff in such case to introduce proof of the fact which he relies upon. *Ibid.*

Where the statute makes the sheriff liable for failing to pay such county creditors as have their names upon a certain list furnished to him, if demand be made upon him, a motion to fix such liability is defective, if it fails to allege that the plaintiff's name was upon such list and that the demand was made. *Ibid.*

A sheriff, who fails to pay into the treasury the public moneys in his hands by the 15th of December, is liable for interest on the same from the first day of June preceding. He is also liable for twenty per cent damages, to be estimated upon the amount due on the first-named day, instead of the balance due when the motion against him and his sureties is made. *Mershon v. Commonwealth*, 2 Met. 371.

Though § 22 of the New York Statute of Limitations, respecting the commencement of action against sheriffs, does not apply to proceedings as for contempt to enforce civil remedies; yet in its spirit it is applicable, and the court will therefore follow it, in the exercise of its discretion. *Van Tassel v. Van Tassel*, 31 Barb. 439.

For the omission of a sheriff to pay over to the county treasurer the proceeds of a sale of lands in a partition suit, the period of limitation begins to run from the time of the omission, not from the time the party in interest is apprised of it. *Ibid.*

In Texas, motion for a rule to compel a sheriff to pay over money collected by him on execution (Art. 1333, Hart. Dig.) does not lie in favor of an assignee of the party entitled to the money, to whom he has given an order for it on the sheriff. *Beaver v. Batte*, 19 Tex. 111.

A sheriff has no authority to receive any thing but money on an execution, and therefore a return, declaring the execution satisfied by a note, is certainly not conclusive, and, unless it also shows a special authority to take a note, probably not even *prima facie*, evidence of payment. *Mitchell v. Hackett*, 14 Cal. 661; *Dibble v. Briggs*, 28 Ill. 48.

If both plaintiff and defendant consent that the sheriff shall sell on credit, they cannot complain that he does not pay the proceeds immediately upon the sale.

trover, or replevin against any one who takes it out of his possession; although the execution has not been returned, if the return-day has not arrived.¹ And the officer has been held to have this right of action without actual possession. Thus, where a constable levies on personal property, and leaves it in the possession of the defendant, he only loses his lien thereon, when the property is levied on under other executions, and may maintain trover against one who removes it without such execution.² So where a constable levied an execution on the defendant's horse, and it was agreed that the defendant should ride the horse home, and that the constable should wait for his money; it was held that the agreement was merely voluntary, and that the constable might re-seize the horse, and, if it was taken from him by force, might bring trover to recover it.³ (a) The property must be in the power or the view of the sheriff.⁴ Though he need not have man-

¹ *Sewell v. Harrington*, 11 Vt. 141; *Davidson v. Waldron*, 31 Ill. 120; *Dunkin v. M'Kee*, 23 Ind. 447. See *Cluley v. Lockhart*, 59 Penn. 376. See pp. 137, 162.

² *Mangum v. Hamlet*, 8 Ired. 44.

³ *Douglass v. Mitchell*, 2 Murph. 237.

⁴ *Linton v. Com.*, 46 Penn. 294.

Langdon v. Summers, 10 Ohio, N. S. 77.

Where a sheriff, under proceedings in partition, sold land for a sum in hand, taking judgment-notes for the balance of the purchase-money in his own name, which were afterwards lost, and suit brought against him therefor on his official recognition, by the parties interested: held, it should have been left to the jury, whether the money was lost by the negligence of the sheriff; and it was error to charge the jury, that the plaintiff was entitled to a verdict. *Snively v. Commonwealth*, 40 Penn. 75.

The sheriff's return made him liable to pay the hand-money into court, or to the several parties interested, so soon as their shares were ascertained, or to a call to bring the judgment-notes into court, that the parties might have them properly disposed of. *Ibid.*

If an officer takes any thing but money, or bank-notes circulating as such, in the absence of instructions, in satisfaction of a judgment, this will not bind the plaintiff, who may proceed on the judgment as before, and oblige the defendant to pay it again. But an officer would be estopped to set up this rule to defeat a proceeding against himself. So if it was the act of his deputy. But the sureties are not so estopped. *Draper v. State*, 1 Head, 262.

If a sheriff collects money on a *fi. fa.* and deposits it in a bank which fails, he is

liable to the plaintiff. *Phillips v. Lamar*, 27 Geo. 228.

(a) A constable levied an execution on a mare, which was claimed by a third person, and on a trial of the right of property the claimant succeeded. Pending the trial, the constable delivered the mare to A and B, one of whom was the execution plaintiff, they agreeing in writing to return the mare to the constable, or pay him \$35.50 should the claimant succeed. After the trial, A and B tendered to the constable \$35.50, which he refused, but they would not return the mare. Held, that the constable could not maintain trover against A and B for the mare. *Grady v. Newby*, 6 Blackf. 442.

It is held that a deputy sheriff may insure property levied upon. *White v. Madison*, 26 N. Y. (12 Smith) 117. See *Aspinwall v. Torrance*, 1 Lans. 381.

But a sheriff has no right to the use of property levied on. Thus a levy on manuscripts gives him no right, before the sale, to make and sell copies thereof. And he is liable for the damages occasioned by such wrongful act. *Banker v. Caldwell*, 3 Minn. 94.

If an officer pay an execution in his hands to avoid a motion against him, he cannot thereafter obtain an alias execution, and enforce payment to reimburse himself. Neither can he sue the original debtor in assumpsit. *Burt v. Thompson*, 3 Head, 534.

ual possession.¹ His possession must be such as would be a trespass, but for his official authority.² But, to maintain trover for goods taken in execution, the officer must have made an actual and effectual levy.³

§ 47. The right of the officer, to maintain an action on account of property levied upon, has been held to exclude any such right on the part of the judgment creditor. Thus where a levy has been made on goods, which are afterwards distrained by the landlord for rent in arrear, no action can be maintained against the landlord by the execution creditor, but only by the officer.⁴

§ 48. With regard to *the measure of damages* against an officer, for his default in relation to an execution, it will be, in general, the injury actually sustained by the plaintiff therefrom. It has been held, that, in an action against a sheriff, for failing, through mere negligence, to make the money on an execution, and to return it according to its mandate, the amount of the execution is the measure of damages, notwithstanding the defendant may have continued entirely solvent; and that the mere failure of the plaintiff to enforce satisfaction of his execution from the defendant, when he could have done so, does not impair his remedy against the sheriff.⁵ But the prevailing rule is, that the measure of damages is the amount of injury actually sustained. (See chap. 29.) Thus the plaintiff, being grantee of an equity of redemption, for the purpose of strengthening his title, caused it to be sold on an execution which he held against his grantor, bid it off himself for the amount of the execution, and took a deed of it from the officer but paid the officer no money except his fees and expenses. In consequence of a neglect on the part of the officer, the sale proved ineffectual, but the plaintiff's title was valid independently of the sale. Held, the plaintiff might maintain an action against the officer for his default, but the measure of damages was not the sum bid by the plaintiff at the sale, but the amount of the fees and expenses actually paid by him, with interest from the time of payment.⁶

¹ Bond v. Willett, 31 N. Y. (4 Tiffa.) 102. See Minor v. Smith, 13 Ohio St. 79.

² Havely v. Lowry, 30 Ill. 446; Roth v. Wells, 29 N. Y. (2 Tiffa.) 471.

³ Brian v. Strait, Dudley, S. C. 19.

⁴ Taylor v. Manderson, 1 Ashm. 130.

⁵ Evans v. Governor, 18 Ala. 659.

⁶ Sexton v. Nevers, 20 Pick. 451. See State v. Lowrance, 64 N. C. 483.

CHAPTER XXXI.

ARREST, BAIL, ESCAPE.

1. Arrest.
2. Bail.

6. Escape.

§ 1. *Arrest of the body*, as well as seizure of property, being a mode provided by law for the service of civil process; the rights and liabilities of an officer are also to be considered in the former as well as the latter point of view. (a)

(a) See chap. 6; *Hooper v. Lane*, 8 Ell. & Bl. 1095; *Johnson v. Whitman*, 10 Abb. Pr. N. 111; *Brown v. Ashbough*, 40 How. Pr. 226; *Redfield v. Frear*, 9 Abb. Pr. N. 449.

In an action for failing to serve a *capias*, the sheriff cannot show that he and his deputies had always found difficulty in arresting the party. *Spence v. Tuggle*, 10 Ala. 538.

If a judgment creditor directs an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him. *New Hampshire, &c. v. Varnum*, 1 Met. 34.

In an action against a sheriff for arresting a stockholder on an execution against a manufacturing corporation, the defendant may give in evidence his instructions from the judgment creditor. *Richmond v. Willis*, 13 Gray, 182.

In relation to arrest, see, further, *Niver v. Niver*, 43 Barb. 411; *Honey v. Starr*, 42 Barb. 435; *Smith v. Knapp*, 30 N. Y. (3 Tiffa.) 581; *Houghton v. Wilson*, 10 Gray, 365; *Gunn v. Davis*, 26 Geo. 169; *Hooper v. Lane*, 8 Ell. & Bl. 1095; *Jones v. Seward*, 41 Barb. 269.

We have already (p. 2, n.) briefly referred to the right of arrest upon civil process, as somewhat depending upon the nature of the cause of action — upon the consideration, whether it is simply an express or implied contract, or whether it also involves a wrong or fraud, in which latter case alone, by the prevailing statutory law, imprisonment is now authorized. A few somewhat miscellaneous cases, upon this and other topics relating to the general subject of arrest, may here properly be added. See *Wagner v. Lath-*

ers, 26 Wis. 436; *Stewart v. Levy*, 36 Cal. 159.

A statute authorizing arrest on certain conditions is to be construed strictly. The required affidavit must state the facts upon which a belief of fraud is predicated. Otherwise the order of the court or magistrate is void, and the arrest illegal. But a statement of facts, which have a legal tendency to induce such belief, though the facts be slight and inconclusive, will sustain the order till reversed or set aside. The issuing of it is only an error in judgment. *Spice v. Steiner*, 14 Ohio St. 213. See *Hall v. Munger*, 5 Lans. 100; *Johnson v. Maxon*, 23 Mich. 129.

Where a statute provides for an arrest, upon affidavit that the defendant is *likely* to remove beyond the jurisdiction; an affidavit that he “*intends* to leave the State” is insufficient. *Wood v. Melius*, 8 Allen, 434.

Sect. 180, (Ky.) Civil Code, authorizing an arrest if a debtor is “about to depart from the State,” contemplates an intention of leaving the State permanently. *Myall v. Wright*, 2 Bush, 130. See *Brown v. Kelley*, 20 Mich. 27.

Under the amendment of 1863 to § 179, subd. 4 of the (N. Y.) Code, it is not necessary, in an action “brought to recover damages for fraud or deceit,” to aver that the defendant is a non-resident or about to depart from the State; and an order of arrest will not be vacated upon affidavits denying only this intention. *Hazlett v. Gill*, 4 Rob. (N. Y.) 627.

The writ required by (New Hampshire) Rev. Sts. c. 185, § 8, to be indorsed with the affidavit of the creditor, or some

§ 2. The rights and duties of officers in reference to *bail* are often brought in question.¹

¹ See *Sparhawk v. Bartlett*, 2 Mass. 188; *McKenzie v. Smith*, 48 N. Y. 143; *Townsend v. Stoddard*, 26 Geo. 430; *Outlaw v.*

Gilmer, 27 Geo. 365; Mass. *v. Bartlett*, 10 Gray, 490; *Metcalf v. Stryker*, 31 Barb. 62.

person in his behalf, to justify an arrest of a debtor on mesne process or execution, is the writ by virtue of which such arrest is made; and an affidavit upon a writ of mesne process is not sufficient to authorize an arrest on the execution issued in the action. *Kidder v. Farrar*, 20 N. H. 320.

The extent, to which the nature and sources of information upon which an order of arrest is sought under §§ 179, 181 of the (N. Y.) Code must be disclosed, is within the discretion of the judge. *Smith v. Frank*, 2 Rob. (N. Y.) 626.

The affidavit for an arrest under subd. 4, § 179 of the (N. Y.) Code, must contain not only a general allegation of the falsity of the defendant's representations, but also a detailed averment of such facts within the affiant's knowledge, as shall be sufficient to satisfy the judge that such representations were untrue and made with intent to defraud. *Smith v. Jones*, 4 Rob. (N. Y.) 655.

On the hearing of a motion to vacate an order of arrest, the statements of the parties were directly contradictory, they being the only witnesses. The complaint, sworn to as true, stated a case of agency, in which no right to use the money deposited, except in the plaintiff's business, existed. Held, the arrest was justified. *Clark v. Pinckney*, 50 Barb. 226. See *Merritt v. Heckscher*, 50 Barb. 451.

In a late case it is held, that, under the (N. Y.) Code, the capacity in which a defendant receives money, so as to subject him to arrest for withholding it, is part of the cause of action, and cannot be tried on affidavits. *Swift v. Wylie*, 5 Rob. (N. Y.) 680.

Process to arrest may be sued out by an agent; as by the wife of the plaintiff. *Harlan*, 39 Ala. 563.

Trespass will not lie against a person for making an affidavit upon which another is unlawfully arrested, if made with no knowledge of the purpose for which it was to be used, and if he did not intend to have it so used. *Roth v. Smith*, 41 Ill. 314. See further p. 205.

In New York, one authorized to sell, and keep all he can get beyond a fixed price, though he is not to pay over the identical money received, but may pay

by his own check, is an *agent*, and liable to be arrested for not paying over the proceeds. *Barret v. Gracie*, 34 Barb. 20.

An affidavit is sufficient, "That the said P. has disposed of and secreted his property with intent to defraud his creditors." *Hughes v. Person*, 63 N. C. 548.

So, (to procure an attachment) "fraudulently or criminally contracted the debt or incurred the obligation." *Sturdevant v. Tuttle*, 22 Ohio St. 111; *Kirk v. Whitaker*, Ib. 115. See *Moller v. Azzar*, 11 Abb. Pr. N. S. 233.

So a person receiving money for the purchase of goods, and under a distinct understanding that it is not to be used in any other way, is a *factor acting in a fiduciary capacity* within the meaning of § 179 of the (N. Y.) Code, and may be held to bail for a misappropriation of the money. *Noble v. Prescott*, 4 E. D. Smith, 139.

In New Jersey, the defendant acted as the plaintiff's agent, was by him intrusted with goods to be used in his business, and converted those goods to his own use. He was, as agent, intrusted with blank acceptances, to be filled up, as required in the business, for the use of the principal, in divers sums to a certain aggregate amount, and he filled them to a much larger amount, and appropriated the avails of all to his own use. Held, a fraud and misdemeanor, for which he might be held to bail. *Seidel v. Peschkaw*, 3 Dutch. 427.

Where A, one of two contracting parties, placed in the hands of B, the other, certificates, by way of security, which were wrongfully converted by B, and A brought a suit for damages; held, the judgment was not for a debt arising out of a contract, and B might be arrested, under Wisconsin Rev. Sts. c. 127, § 2, and execution against his person might issue under Rev. Sts. c. 134, § 7. *Mowry*, 12 Wis. 52.

But, in New Jersey, under the statute authorizing imprisonment for debt in case of fraud, it is requisite to holding to bail, that the fraud be clearly shown, and by such testimony as would be admissible in a court of justice. *McKernan v. McDonald*, 3 Dutch. 541.

So, in New York, where an insolvent purchases goods on the strength of his own representations of solvency, he is not liable to arrest in an action for the

§ 3. It is held in England, that, if a defendant in custody upon mesne process tender a bail-bond, with sufficient sureties, to the

value of the goods, unless he knew that such representations were false at the time he made them. Suspicious circumstances, attending an assignment of property by an insolvent, are not sufficient *per se* to authorize his arrest and imprisonment. *Birchell v. Strauss*, 28 Barb. 293. See *Roberts v. Prosser*, 4 Lans. 369.

In case of representations as to the pecuniary ability of a third person, whereby the plaintiff was induced to sell and deliver to the latter goods on credit, and was damaged; the defendant cannot be held to bail, unless it be shown by the affidavits that he is a non-resident, or is about to depart from the State. The liability is not a debt fraudulently contracted, nor an obligation fraudulently incurred, within the meaning of subd. 4 of § 179 of the Code. *Smith v. Corbiere*, 3 Bosw. 634.

The plaintiff's assignor employed the defendant as his broker, to sell for him a certain number of shares of railroad stock, not then owned by him, placing in the defendant's hands certain sums as "margins," to secure him against loss in case of a rise in the stock. The defendant sold the stock, and, in conformity to his instructions, borrowed from a third person the number of shares sold, and delivered them to the purchaser, receiving the price. Held, such moneys were not received by the defendant in a merely fiduciary character, and that he was therefore not liable to arrest under the second subdivision of § 179 of the (N. Y.) Code, in an action for the conversion of the money. *McBurney v. Martin*, 6 Rob. (N. Y.) 502.

In an action for fraudulently misrepresenting the responsibility of another, whereby the plaintiffs were induced to sell the latter merchandise on credit; an order of arrest may be granted, under subd. 1 of § 179 of the (N. Y.) Code of Procedure, where the defendant is a non-resident. *Sherman v. Brantley*, 7 Rob. (N. Y.) 55.

Where a debtor delivered, as security for a loan, several orders drawn by his wife for money yet to become due her, payment of which she afterwards stopped; held, not a case authorizing an order of arrest for a fraud. *Isaacs v. Gorham*, 1 Hilt. 479.

One who has wrongfully obtained possession of property by fraudulent representations, and refuses to return it or make compensation, is guilty of a wrong

for which he may be held to bail. The claim is not founded upon the contract, but upon fraud. *Hoyes v. Jones*, 1 Edm. Sel. Cas. 11.

The receipt of money as attorney, no part of which has been paid, entitles the principal, as of course, to an order of arrest, under subd. 2, § 179 of the (N. Y.) Code, and to an execution against the person irrespective of any order of arrest. *Gross v. Graves*, 2 Rob. (N. Y.) 707.

Money deposited with a broker, merely to secure him in the performance of the depositor's orders as an agent, is held in a "fiduciary capacity" within the meaning of § 179 of the (N. Y.) Code, authorizing an arrest. *Clark v. Pinckney*, 50 Barb. 226.

The same provision applies to a factor who has received and misappropriated or refuses to pay over money. As, to a merchant who has received goods to sell on commission, and has mingled the proceeds with his own funds or applied them to his own business, *Duguid v. Edwards*, 50 Barb. 288; *Brown v. Ashbough*, 40 How. Pr. 226; *Johnson v. Whitman*, 10 Abb. Pr. N. 111; *Warnemacher v. Davis*, 2 Sweeny, 272; *Hicks*, 20 Mich. 280.

In an action to recover possession of personal property unjustly detained, and damages, an order of arrest may be made under the third subdivision of § 179 of the (N. Y.) Code, and may require the sheriff to hold the defendant to bail in a specified sum. *Tracy v. Griffin*, 50 Barb. 70.

An execution for possession and costs, in a writ of entry to foreclose a mortgage, requires no affidavit to authorize the arrest of the defendant for the costs, under (Mass.) Gen. Sts. c. 124, §§ 5 and 6. *Hildreth v. Brigham*, 12 Allen, 71.

Where a cause of action authorizing an arrest is joined with one not of that class, the right of arrest is waived. *Lambert v. Snow*, 2 Hilt. 501.

So, in case of such joining, where the plaintiff recovers an entire judgment. *Hickox v. Fay*, 36 Barb. 9.

An affidavit for the arrest of "the defendant," in a writ against two defendants, without showing which is intended, is insufficient to authorize the arrest of either. *Hitchcock v. Baker*, 2 Allen, 481.

Where the sheriff (or his officer) has arrested on one valid writ, he may detain on any number which he had at the time,

bailiff, and he refuse it, yet an action of trespass will not lie against him, but only an action on the case against the sheriff.¹ But, in

¹ *Smith v. Hall*, 2 Mod. 31.

or afterwards. But in case of an arrest on an invalid writ the party has been deprived of his liberty, in circumstances which make it the duty of the sheriff to discharge him. He has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary. But to allow the sheriff to make such an arrest, while the party is unlawfully confined by him, would be to permit him to profit by his own wrong. The sheriff cannot *arrest him*, because he has already been deprived of his liberty; nor detain him, because he is entitled to be discharged. The custody amounts to a false imprisonment.

The liberty of the subject requires, that a person illegally arrested should have an absolute unqualified right, against the person who has illegally arrested him, to be set at large, without reference to others.

Though for some purposes the sheriff is the *agent* of the party who puts a writ into his hands, he is not a mere agent. He is a public functionary, having duties to perform, as well towards those against whom the writs in his hands are directed, as towards those who put those writs into his hands, to both parties. *Hooper v. Lane*, 8 Ell. & Bl. 1095.

A creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested by order of a judge. Upon affidavit, the court, by rule, set aside the whole, as an abuse of the process of the court. *Stein v. Valkenhuysen*, 1 Ell., Bl. & Ell. 65.

A militia officer cannot, when out of the State, claim exemption from civil process, upon the ground, that he is on his way, under the orders of his commanding officer, to attend a company meeting, for escort duty, within the State; since, in such case, he is without the jurisdiction of his commanding officer. *Manchester v. Manchester*, 6 R. I. 127.

But suitors are exempt from arrest on civil process, whilst going to, staying at, or returning from, court, though they reside out of the State. *Henegar v. Spangler*, 29 Geo. 217.

A party whose cause is pending in court, and who goes to court in order to attend the trial, or its removal to another court, is not liable to arrest while going or returning home; and merely stopping, to announce to the counsel of the oppos-

ing party that nothing will be done in the cause, is not such a deviation as to justify his arrest. *Salhinger v. Adler*, 2 Rob. (N. Y.) 704.

In England, a person who attends before justices at petty sessions, in order to obtain a summons with a view to recover a penalty, and gives evidence before them for the purpose, is not privileged from arrest, either in going there with a view to give the evidence and obtain the summons, or on his return after having done so. *Cobbett*, 7 Ell. & Bl. 955.

The privilege from arrest applies to an inhabitant of one State who comes into another solely as a witness, though not summoned. *May v. Shumway*, 82 Mass. 86. See *Hoppin v. Jenckes*, 8 R. I. 453.

In New York, an order of court, for arrest on execution, is not necessary. *Ginochio v. Figari*, 4 E. D. Smith, 227.

The act of 1831, authorizing imprisonment for debt in certain cases, applies to debts which have been assigned. *King v. Kerby*, 28 Barb. 49.

The provisions of subdivision 2 of § 179 of the code, authorizing the arrest of a public officer, in an action for money received and property embezzled and fraudulently misapplied by him, are applicable to an English public officer, who has, in England, on a writ of extent, been found by the inquisition of a jury to have embezzled public funds. The proceedings there do not amount to an extinguishment of the original claim. *Peel v. Elliott*, 28 Barb. 200.

In an action for real property, and damages for withholding it, the defendant may be arrested and held to bail. Consequently, if the plaintiff fails in the action, and there is a judgment against him for the costs, he becomes himself the judgment debtor, and, by virtue of § 288 of the code, is liable to arrest and imprisonment upon execution. *Merritt v. Carpenter*, 30 Barb. 61.

Where a defendant, having been arrested on an execution issued by the marine court, is discharged from arrest by that court on motion, such discharge, without the plaintiff's consent, does not deprive the plaintiff of the right to issue a second execution. *Ginochio v. Figari*, 4 E. D. Smith, 227.

Where the right to arrest arises from the nature of the action, as where it is for a conversion by an agent, affidavits to

an action for refusing to take bail, it is sufficient to prove the arrest, the offer of sufficient bail, and the commitment. The party is not bound to tender a bond.¹

¹ *Millne v. Wood*, 5 C. & P. 587.

disprove the cause of action are inadmissible. *Solomon v. Waas*, 2 Hilt. 179.

It is held that an order of arrest, upon a cause of action which would authorize an execution against the body, will not be vacated, merely because the affidavits deny the cause of action. *Bedell v. Sturta*, 1 Bosw. 634. See *Swift v. Wylie*, 5 Rob. 680.

The facts in issue, on a motion to discharge an order of arrest, were the same as those constituting the cause of action. On the affidavits, there was a fair question for the jury, and therefore the court refused to prejudge the case, and allowed the order to stand. *Barret v. Gracie*, 34 Barb. 20.

In Massachusetts, under St. 1857, c. 141, § 17, no person can be arrested on mesne process, if the affidavit of the creditor, "that he believes that the defendant has property not exempt from being taken on execution," omits to add, "which he does not intend to apply to the payment of the plaintiff's claim," or to state not only that the creditor believes, but that he "has reason to believe, the defendant has property," &c. *Stone v. Carter*, 13 Gray, 575.

In Pennsylvania, the act of July 12, 1842, is a substitute for the old law of arrest and imprisonment in actions on contracts. It provides that, on application, a creditor, after suit, and after substantiating the necessary facts, may have an order of commitment. *Gosline v. Place*, 32 Penn. 520.

In California, to justify execution against the person, the issue of fraud must be made by the pleadings, passed upon by the jury, and ascertained by the judgment. *Davis v. Robinson*, 10 Cal. 411.

The arrest upon an affidavit is only upon mesne, not upon final process. *Ibid.*

If the circumstances authorizing arrest occur pending the suit, the party must, upon leave obtained, set them out in a complaint. *Ibid.*

There must always be a special finding on the question of fraud, so as to keep it distinct from the body of the case. *Ibid.*

In Louisiana, it is not necessary to state in the affidavit for a writ of arrest, where the defendant resides or has his domicile. *Hanney v. Boehner*, 14 La. Ann. 859.

If the case comes within the exception

in favor of non-residents, the defendant may plead the exception, and, on proof of it, the proceeding in arrest will be set aside, if it was not alleged in the affidavit that the defendant had absconded from his residence. *Ibid.*

In Arkansas, females are privileged from arrest in civil cases. Hence a *capias* clause against a female defendant, in a writ of attachment, is illegal, and may be quashed on motion: but if the writ be in other respects good in form, the whole writ should not be quashed. *Hatheway v. Jones*, 20 Ark. 109.

In England, where a writ of summons is specially indorsed under § 25 of the Common-law Procedure Act, 1852, and judgment is signed for default of appearance, pursuant to § 27, after payments made by the defendant on account, the plaintiff is not entitled to sign judgment for the sum indorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid. *Hodges v. Callaghan*, 2 C. B. N. S. 306.

By a special indorsement under the above statute, the plaintiff claimed £34 11s. 7d. The defendant, after the issuing of the writ, and before judgment, paid £25 on account, and judgment was signed and execution issued for the full amount, but with a direction to the officer to take the balance only, and costs. The defendant having been arrested and detained under this writ, a judge at chambers made an order to reduce the amount for which the judgment was signed to the proper sum, and to discharge the defendant from custody, in pursuance of the 7 and 8 Vict. c. 96, § 57, the sum recovered not exceeding £20, exclusive of costs. The court refused to rescind the order. *Ibid.*

The arrest took place on the 14th of August, and the application for the defendant's discharge was not made until the 11th of December. Held, not too late. *Ibid.*

An order of the war department, relating to the arrest and detention of deserters, and specifying the persons authorized to make such arrests, should be construed strictly, and with the precise limitations which it prescribes. It does not authorize any *procuratio* or delegation. The maxim applies, "*Expressio unius est exclusio al-*

§ 3 a. The debtor by his acts may waive his claim against the sheriff for an unauthorized requisition of bail. Thus a defendant,

terius." An order to *sheriffs* gives no authority to *deputy sheriffs*. *Trask v. Payne*, 43 Barb. 569.

The *sergeant-at-arms* of the legislature of Massachusetts may lawfully detain in the county jail, with the permission of the sheriff, a prisoner committed by authority of the House of Representatives. *Burnham v. Morrissey*, 14 Gray, 226.

The commitment of a witness, by order of the house, for a term not exceeding thirty days, for contempt in its presence, by refusing to produce books and papers which he had been lawfully required to produce, is not invalidated by containing a direction, that, upon informing the officer of his readiness to produce them, he shall be brought before the house. *Ibid*.

A committee of the house, invested with general powers to investigate the affairs of the State liquor agency, established by St. 1855, c. 215, and to send for persons and papers, reported, that they had notified the agent, and he had appeared before them, but had refused to produce certain books. Whereupon he, by order of the house, was arrested and brought before the house to answer as for a contempt, and was interrogated by the house, and asked to produce the books; and, after being heard by counsel, declined to do so, on the ground that he had no books which he had not produced before the committee, except his private books of account, which contained nothing relating to the matters inquired of. The house thereupon, without further hearing him, passed an order, reciting that he had failed satisfactorily to answer the questions put to him by the house, or to produce the books and papers required of him by a special committee of the house, and also by the house, and was therein guilty of a contempt of its authority; and therefore issued a warrant to the *sergeant-at-arms*, reciting that he had been brought to the bar of the house, to answer as for contempt in refusing to comply with the order of the special committee of the house to produce certain books, and had refused satisfactorily to answer the interrogatories of the house, or to produce the books required of him by the committee and by the house; and reciting the order of the house thereon; and committing him for twenty-five days unless he should sooner signify his willingness to produce

the books, and satisfactorily answer the interrogatories. Held, the commitment was legal. *Ibid*.

A sheriff is not authorized to make an arrest, out of the presence of the court, by a mere order of such court, though such order may justify a detention of one already arrested. There must be a process conformable to the constitution. Nor is it the right or duty of a sheriff to make an arrest, upon a certified copy of a mere decretal order or rule of a court of chancery, directing him to attach the body of a party, and detain him in close custody till he shall comply with certain requirements of the court. *Leighton v. Hall*, 31 Ill. 108.

In treating of the wrong of *false imprisonment* — chap. 6 — we have considered at some length the right of arresting, with or without process, upon the charge or suspicion of crime. A few miscellaneous cases on the same subject may be added in the present connection. See *State v. Lafferty*, 5 Harring. 491; *Shafer v. Mumma*, 17 Md. 331.

The liability to arrest without warrant for common-law felonies remains unchanged by Michigan Comp. L. § 5954. Rev. Sts. of 1846, c. 161, § 18. *Drennan v. People*, 10 Mich. 169.

An officer, knowing of the issuing of a warrant to arrest a man for felony, may lawfully make the arrest in a proper manner, without having at the moment the warrant in his possession. But in order to place the man under any obligation to submit to the arrest, the officer should inform him of the facts, or at least of the offence. *Ibid*.

If a prisoner, lawfully arrested without a warrant by order of a justice, for an assault committed in his presence, escapes, a constable may be ordered by the justice, without a warrant, to pursue and retake him; and, after demand and refusal of admission, may break doors for the purpose. *Com. v. McGahey*, 11 Gray, 194.

A justice may issue a second commitment in place of a defective one previously issued, provided he have any record or entry to which he can refer; but he cannot resort merely to his own recollection for the facts. *Branigan*, 19 Cal. 133.

As to arrest in a *dwelling-house*, upon a

being arrested under a judge's order, proposed to the plaintiff to accept bail, which was accordingly done forthwith, and the bail

criminal warrant, see *Com. v. Irwin*, 1 Allen, 587.

A constable received a warrant for arrest, and, being himself unable to execute it, delivered it to another constable, who gave it to one not a constable, and deputed him to execute it. Held, the second constable had no authority under the warrant, and therefore could not depute it. *State v. Ward*, 5 Harring. 496.

For an offence committed in court, a magistrate may order an instant arrest without affidavit or warrant. *Lancaster v. Lane*, 19 Ill. 242.

A constable cannot, without a warrant, arrest a person guilty of a past offence, unless such offence amounts to a felony. *Commonwealth v. Carey*, 12 Cush. 246; *Same v. McLaughlin*, Ib. 615.

A peace officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace or other crime; or when he has reasonable ground to suspect the party of such offence. *State v. Brown*, 5 Harring. 505.

An officer, making an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resists. *Commonwealth v. Cooley*, 6 Gray, 350. See *State v. Wetherall*, 5 Harring. 487.

Neither the mayor and alderman of a city, nor a surveyor of highways, have power to order a party to be arrested for creating a nuisance, by placing a post in the street. *Donovan v. Jones*, 36 N. H. 246.

Constables and police officers have power to arrest in many cases, upon their own view of an offence committed; as, at common law, for breaches of the peace, and by statute, for breach of police regulations; but they have no such power in a case of placing a nuisance, not specified in the police law, in a highway. *Ibid.*

In Pennsylvania, in misdemeanors, the means provided, for the arrest and return of *fugitives from justice*, is a warrant issued by a justice of the peace of the county where the offence is alleged to have been committed, and indorsed by a justice of the county where the offender is found. *Commonwealth v. Jailer*, 1 Grant, 218.

The court of quarter sessions of one county have no power to order a defendant, charged with a misdemeanor, to be committed in default of bail for his ap-

pearance at the next court of quarter sessions of another county. *Ibid.*

In New York, if, after an entry without force, a justice is satisfied that the persons he finds are gambling, they can be arrested without a warrant. *Willis v. Warren*, 1 Hilt. 590.

Under the act of Congress, making it the duty of the executive authority of a State or territory to arrest and secure till notice, &c., a fugitive from justice from another State, a general warrant from the Governor was held good, though not directed to any named officer. *Robinson v. Flanders*, 29 Ind. 10.

Where the warrant alleging the commission of an offence bore date on the "twenty-third day of April," but the word "third" was written on a level above a word obliterated by drawing a line of ink across it horizontally which appeared to be the word "second," but otherwise was in the usual form; it was held to be regular and sufficient upon its face, and fully authorized the arrest of the defendant named therein. *Com. v. Martin*, 98, Mass. 4.

Where the body of a warrant was directed "to the sheriff or any constable of the county" in which the magistrate resided; held, an authority could not be conferred upon a person named who was not an officer, to execute such warrant, by an indorsement on it signed by the justice, "authorizing and empowering" such person to arrest the defendant and bring him before the justice. *Abbott v. Booth*, 51 Barb. 546.

Where a statute requires that an affidavit shall be inserted in a complaint, before a warrant to search a dwelling-house shall issue, the provision being intended as a safeguard against the invasion of a dwelling-house by process of search without sufficient cause, an oath in the alternative, that the criminal act was done by the defendant or by his consent, is sufficient. *Com. v. Intoxicating Liquors*, 13 Allen, 52.

Where a search-warrant is at variance with the required complaint, in the words "or have been taken from said house for the purpose of being sold;" such variance is not fatal to the proceedings on the warrant. *Ibid.*

A warrant need not contain the facts on which the charge is predicated, if the nature of the offence is clearly specified. As where a warrant, after stating time and place, proceeded: "That

were examined as to their qualifications, their depositions were written and signed, and then delivered to the defendant's attorney, to be attested in the usual manner before a commissioner. After the examination, the plaintiff's attorney indorsed, on an undertaking produced by the defendant, the words "we approve of the within undertaking, and are satisfied with the sureties;" and the defendants were thereupon discharged from arrest. Held, the above acts of the defendant assumed that it was proper to require bail, and were a waiver of any objection to having been held to bail.¹

§ 4. It was formerly held, that an action on the case will not lie against the sheriff, though he take *insufficient bail*; but that he shall be *amerced*, if the defendant do not appear.² But it is a well-settled rule of American law and practice, that an action lies against the sheriff for taking insufficient bail;³ and damages may be assessed according to the plaintiff's real loss, owing to the sheriff's neglect.⁴ Thus if a sheriff knowingly take insufficient bail, it is held that he is liable for the amount of the plaintiff's judgment against the bail, deducting the probable value of that judgment, and of the judgment against the principal.⁵ So it is said, "bail is still regulated by the statute 23 Hen. VI. c. 10, which has always been recognized in the United States as common law. The first branch of this statute, for it consists of only one section, requires the sheriffs to 'let out of prison, &c., upon reasonable *sureties*, &c., having sufficient,' &c."⁶ Hence, if only one surety be taken, the sheriff is at all events responsible for his sufficiency; though the bond is not thereby avoided.⁷ (a) And slight evidence of the insufficiency of bail is sufficient, upon the general ground that the defendant, having himself taken them, is

¹ Dale v. Radcliffe, 25 Barb. 333.

² Ellis v. Yarborough, 2 Mod. 177.

³ 2 Mass. 188. See Young v. Hosmer, 11 Mass. 89.

⁴ Shackford v. Goodwin, 13 Mass. 187.

⁵ Gerrish v. Edson, 1 N. H. 82.

⁶ 2 Greenl. Ev. § 586, n. 4.

⁷ 2 Saund. 61 d, n. 5; Long v. Billings, 9 Mass. 479; Glezen v. Rood, 2 Met. 490.

P. designedly and by false pretences did obtain from him, said complainant, one sulky of the value of \$30, the property of G., with intent to cheat and defraud said complainant." Pratt v. Bogardus, 49 Barb. 89.

(a) In South Carolina, a sheriff may take as bail one not a resident of his district, and having no property therein. Dickison v. Coward, 3 Rich. 49.

So he is not bound to take more than one person as bail; unless he knows, or under the circumstances should have

known him to be insufficient. Bennett v. Brown, 5 Rich. Law, 347.

Under the (N. Y.) Code, § 201, where a defendant is arrested upon an order, and does not give bail, and no deposit is made in lieu thereof, and he fails to appear when process is issued against his person; the sheriff is liable as bail for the amount of the judgment, and evidence of the defendant's insolvency is incompetent in mitigation of damages. Bensel v. Lynch, 2 Rob. (N. Y.) 448.

presumed to have the means of proving their ability.¹ So the plaintiff need not prove knowledge of the bail's insufficiency.² Thus the sheriff is liable for taking a forged bail-bond, though he believed it genuine.³ And the plaintiff need not have actually proceeded against the bail.⁴ And, on the other hand, where he takes an assignment of the bail-bond from the sheriff, and sues the bail to insolvency, this is no discharge of the sheriff's liability for taking insufficient bail, nor an estoppel of the plaintiff's right of action against him.⁵ But it is sufficient to show that the bail were at the time apparently responsible, or that he used a reasonable discretion.⁶ And it is held, that, where the plaintiff neglects for five years to call on the officer for bail, the lapse of time is sufficient to exonerate the officer.⁷

§ 5. An officer is also liable to an action, for failing to *return* a bail-bond with the writ, where the law so provides. If he deliver or offer to deliver it to the plaintiff, in season for the plaintiff to prosecute a *scire facias* against the bail, the sheriff is liable for nominal damages only.⁸ In an action by a judgment creditor against the sheriff, for not delivering over the bail-bond, the debtor having avoided on the execution, it is held that the sheriff cannot show, in mitigation of damages, that the debtor has been insolvent from the time of the rendition of the judgment.⁹ Nor is it necessary to allege, that an execution against the debtor was returned *non est inventus* within a year after judgment; nor that such person had avoided; nor that the plaintiff, or any one in his behalf, made the oath required by statute to warrant an arrest.¹⁰ So, where the sheriff has falsely returned that he took bail, in an action for refusing to deliver the bail-bond to the creditor, he is liable to the full amount of the judgment, and cannot show the inability of the debtor to pay it; because this would be no defence for the bail themselves.¹¹ But if an officer, having a writ against a debtor in extreme sickness and poverty, and having arrested him, untruly returns that he has taken bail; in an action for false return, it is held that he may show these facts, in mitigation of damages, and

¹ Saunders v. Darling, Bull. N. P. 60;

² Greenl. Ev. § 586.

³ Sparhawk v. Bartlet, 2 Mass. 188;

Concanen v. Lethbridge, 2 H. Bl. 36.

⁴ Marsh v. Bancroft, 1 Met. 497.

⁵ Young v. Hosmer, 11 Mass. 89.

⁶ Bennett v. Brown, 1 Strobb. Law, 303.

⁷ Jeffery v. Bastard, 4 Ad. & Ell. 823;

Hindle v. Blades, 5 Taunt. 225. (These were replevin cases. The statute required

"two responsible persons." "The mischief before the statute was, that the sheriff used to accept mere men of straw for sureties." Per Mansfield, C. J., 5 Taunt. 227.)

⁸ Gill v. Stebbins, 2 Paine, C. C. 454.

⁹ Glezen v. Rood, 2 Met. 490.

¹⁰ Seeley v. Brown, 14 Pick. 177.

¹¹ Prescott v. Bancroft, 1 Met. 500.

Simmons v. Bradford, 15 Mass. 82.

that the debtor, having recovered his health, did not conceal himself; and the jury may lawfully give nominal damages only.¹ (a)

§ 6. Another form of liability of officers, is for an *escape*. "Every liberty given to a prisoner, not authorized by law, is an escape."² Thus, if a coroner, having an execution against a deputy jailer, arrests him, and the sheriff is not at the jail, nor any keeper authorized by him; the coroner, leaving his prisoner at the jail-house, is discharged, and the sheriff is guilty of an escape.³ So it is an escape to make a prisoner for debt a turnkey, and intrust him with the keys of the outer and inner doors, at all times, by day and night. Or to commit a jailer to his own jail, appointing no new keeper.⁴ So it is an escape if a prisoner go into the country and wander about freely, though he afterwards return.⁵ And if the sheriff permit a debtor, who has been surrendered by his bail, and by the court committed to the custody of the sheriff, to go at large before the expiration of thirty days; he shall be chargeable for an escape, although he was not furnished with a copy of the order of court committing such debtor.⁶ So the sheriff is chargeable for an escape, if he give a prisoner the liberty of the yard on a bond, in a penal sum less than double the amount of the sums for which he is imprisoned, as required by law, although approved by two justices according to the statute.⁷ So a sheriff is liable for the escape of a debtor committed on mesne process, although the creditor, while the suit was pending, procured

¹ Weld v. Bartlett, 10 Mass. 470. See Stevens v. Rome, 3 Denio, 327.

² Per Parsons, C. J., Colby v. Sampson, 5 Mass. 312. See Rose v. Green, 1 Burr. 437; Farrar v. Barnes, 12 Rich. 224; Smith v. Com., 59 Penn. 320; Com. v. Mitchell, 3 Bush, 30; Riley v. Whittiker, 49 N. H. 145; Beckwith v. Smith, 4 Lans.

182; Bullymore v. Cooper, 2 Lans. 71; Com. v. Curley, 101 Mass. 24.

³ Colby v. Sampson, 5 Mass. 310.

⁴ Steere v. Field, 2 Mason, 486.

⁵ Nall v. State, 34 Ala. 262.

⁶ 2 Mass. 549.

⁷ Clapp v. Hayward, 15 Mass. 276.

(a) In North Carolina, upon exception taken to the bail returned by the sheriff, in order to charge him, there must be notice and a judgment declaring the insufficiency of the bail, and adjudging that the sheriff stand as special bail prior to the trial and judgment in the principal suit. Worth v. Winbourne, 7 Jones, 431.

In New York, where the sheriff arrests a defendant under an order, duly made under § 179 of the Code, and allows him to go at large, on executing the proper bond, with sureties who fail to justify on being excepted to; and the plaintiff recovers judgment for the value of the property, and damages for the detention thereof, with costs: it has been held that he may maintain an action against such sheriff to

recover the amount of the judgment, after an execution against the property of the defendant has been returned unsatisfied. It is not necessary that an execution against the body of such defendant, nor a writ *de retorno habendo*, be issued, and returned unsatisfied. Gallarati v. Orser, 4 Bosw. 94.

Under the statute (Code, § 201) which provides, that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail;" the liability of the sheriff is the same as that of the bail would have been, if they had justified. Ibid. Reversed, 27 N. Y. 324.

an amendment of his declaration, which entitled him to enhanced damages; at least to the extent to which he would have been liable, if no amendment had been made.¹ So, in an action under the New York Code, brought against a sheriff for the escape of a debtor imprisoned on a *ca. sa.*; the liability of the sheriff is like that of bail. It is not a defence, either total or partial, that the debtor at the time of such escape was insolvent.² So a debtor's insolvency is no defence, and therefore an answer relying on it is demurrable; if available, it is only in mitigation of damages.³ Nor is it any defence, as is sometimes held, that the prisoner was privileged from arrest.⁴ (But see § 6 *b.*) Nor that the execution was issued before one against property had been issued and returned unsatisfied, as the *ca. sa.* is not thereby rendered void.⁵ So an action on the case will lie against a sheriff, for refusing to assign to the creditor, upon request, after breach of condition, a jail bond, taken upon admitting the debtor to the liberties of the prison. And where such bond was taken, upon the commitment of the debtor on mesne process, it is no excuse for the sheriff, that, pending the suit, the plaintiff, by leave of court, added a count for a new and distinct cause of action, and that his judgment was rendered for a sum in damages, founded upon claims embraced in both counts. The surety in the bond can alone insist upon such matter in avoidance of the bond.⁶

§ 6 *a.* In an action against an officer, for an escape by a debtor whom he has arrested on mesne process, the plaintiff need not prove an entry of the original writ; and a declaration averring the commencement of an action by writ returnable to the Court of Common Pleas, "as by the record of the same writ, in the same court remaining, more fully appears," is sustained by proof that the writ was returned by the officer to the clerk's office, and placed in the files of non-entries.⁷

§ 6 *b.* But it is not an escape, if the door of a prison, in which a debtor was confined under a *ca. sa.*, is permitted to remain open, the debtor not leaving the prison.⁸ So an officer, having a debtor in custody, may allow him reasonable liberties; and the debtor cannot set up such liberties as an escape, provided there be no abandonment of the arrest.⁹ So where a debtor, while at large

1 *Vilas v. Barker*, 20 Vt. 603.

2 *McCreery v. Willett*, 4 Bosw. 643.

3 *Barnes v. Willett*, 35 Barb. 514.

4 *Gill v. Miner*, 14 Ohio St. 182.

5 *Renick v. Orser*, 4 Bosw. 384.

6 *Ibid.*

7 *Whithead v. Keyes*, 1 Allen, 350.

8 *Currie v. Worthy*, 2 Jones, 104.

9 *Butler v. Washburn*, 5 Fost. 251.

within the prison-limits, had been employed by the jailer to render sundry services in connection with the care of the jail, being sometimes intrusted with the keys, and sometimes taking charge of the prisoners when conducted to or from the jail, but which services were rendered under the supervision of the jailer, and all within the prison liberties; it was held, that such employment of the debtor by the jailer did not constitute a voluntary escape.¹ And, somewhat contrary to cases previously cited, in an action against the sheriff for an escape, it is held a defence, that the party was illegally held in custody.² As in case of one arrested on a process void because the statute granting it had not been complied with; the rule, that a ministerial officer is protected by the writ of a competent court, good on its face, being held a rule of protection merely, and personal to the officer.³ And, in general, an officer is not liable for the escape of a debtor, whom he has arrested on a process which was insufficient to authorize the arrest.⁴

§ 6 *c.* The officer is not liable for an escape after one is brought into court upon *habeas corpus*.⁵

§ 7. If a party be in custody on final process, he may be *re-taken* after a *negligent* escape; but not after a *voluntary* escape.⁶ (a) And if, in the latter case, the creditor will not authorize a recapture, this is not such a discharge of the debtor from imprisonment as will discharge the debt, and the sheriff will be liable for it.⁷ And the magistrate, before whom the debtor is brought upon the second arrest, has no jurisdiction to determine upon the right of the officer to make it.⁸ But it is a justification to the bailiff against an action of false imprisonment, that he retook a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the first arrest.⁹ (b)

¹ Bolton v. Cummings, 25 Conn. 410.

² Carpentier v. Willet, 6 Bosw. 25. See pp. 211, 213.

³ Tuttle v. Wilson, 24 Ill. 553.

⁴ Hitchcock v. Baker, 2 Allen, 431.

⁵ Barth v. Clise, 12 Wall. 400.

⁶ Butler v. Washburn, 5 Post. 251;

Bruce v. Snow, 20 N. H. 484; 6 Allen, 260. See Weaver v. Commonwealth, 29 Penn. 445.

⁷ Jackson v. Hampton, 6 Ired. 34.

⁸ Doane v. Baker, 6 Allen, 260.

⁹ Atkinson v. Matteson, 2 T. R. 172.

(a) See Bensel v. Lynch, 44 N. Y. 162; Sanderson v. Rutland, 43 Vt. 385.

(b) An action on the case lies against a jailer, for voluntarily permitting the escape of a prisoner confined on mesne process, though the prisoner returns to prison on the same day, and the plaintiff proceeds to final judgment against him. Ravenscroft v. Eyles, 2 Wils. 294. See Com. v. Mitchell, 3 Bush, 30.

If a person, being arrested, escapes

from the officer without questioning his authority, he has not that right to the same extent upon a re-arrest. State v. Phinney, 42 Me. 384.

In Indiana, under 2 G. & H. §§ 55, 56, a prisoner that escapes after conviction, and is not retaken till after the expiration of his term of sentence, may be held additionally till it is fulfilled. Clifford, 29 Ind. 106.

One voluntary escaping from impris-

And where the sheriff arrested a defendant by virtue of a *ca. sa.*, and in good faith released him by taking bond for his appearance at court, to take the benefit of the act for the relief of honest debtors, in an amount less than twice the amount of the creditor's demand; held, he was not guilty of a voluntary, but of a negligent escape, and might retake the defendant in a *ca. sa.*, and surrender him in court, in discharge of his liability to an attachment for contempt.¹ So where a sheriff's officer kept the defendant in custody after the return of the writ, and then committed him to prison; held, no action would lie for an escape.² (a)

§ 8. In an action for an escape, the sheriff cannot take advantage of an *irregularity* or *error* in the process, not appearing on its face, and which does not render it void.³ But he may show want of jurisdiction in the court.⁴ Or that the process was void.⁵ (b) So a sheriff is not liable for an escape, where his prisoner is discharged on *habeas corpus*, by the Supreme Court commissioner, in a

¹ Colley v. Morgan, 5 Geo. 178.

² Planck v. Anderson, 5 T. R. 37.

³ Spafford v. Goodell, 3 McLean, 97; Bensel v. Lynch, 2 Rob. (N. Y.) 448.

⁴ Bull. N. P. 656; Bissel v. Kip, 5

Johns. 89; Yelv. 42 a, n. 1; Carth. 148; Albee v. Ward, 8 Mass. 79; Bushe's case, Cro. Eliz. 188.

⁵ Howard v. Crawford, 15 Geo. 423. See pp. 211, 212.

onment for fine and costs may be re-arrested. State v. McClure, Phill. (N. C.) 491.

In an action against a sheriff to recover the amount of an execution against a judgment debtor who had escaped, evidence of facts legally excusing the defendant from recapturing the debtor, is new matter, and, under the (N. Y.) Code, inadmissible, unless set up in the answer. Richtmeyer v. Remsen, 38 N. Y. 206.

(a) If a party who is in custody, accused or convicted of a criminal offence, escapes, he may be recaptured at any time afterwards, whether the escape is voluntary or involuntary on the part of the sheriff. Commonwealth v. Sheriff, 1 Grant, 187.

It is held that, under an indictment for a negligent escape, a voluntary escape may be shown, as the latter includes the former. Wall v. State, 34 Ala. 462.

In an action for the escape of a prisoner committed on a *ca. sa.*, and duly admitted to the jail liberties, where the escape counted on is alleged and proved to have occurred in August, 1855, it is no defence, that in January of that year there was a prior escape, if it appears that the prisoner voluntarily returned into custody and continued there until the second escape, and it does not appear that the plaintiff had any notice of the first escape before

the return of the prisoner into custody, and although the action is brought more than a year after the first escape, and the defendant pleads the Statute of Limitations. Renick v. Orser, 4 Bosw. 384.

(b) A jailer is not liable for an escape, for not detaining a debtor, who is committed upon what appears, from the copy left with the jailer at the time of commitment, to be a void process. He is not bound to look beyond his copy. As where the copy showed that the original process was a writ of summons. Kidder v. Barker, 18 Vt. 454. See Com. v. Mitchell, 3 Bush, 30.

A sheriff will not be liable for the escape of the accused, although he took a defective recognizance, if the court neglected its duty to hold the accused in custody until he should acknowledge unexceptionable recognizances. Com. v. Reed, 3 Bush, 516.

Where a person arrested on civil process by a deputy sheriff escaped from him, and the return on the writ negatived the idea that the sheriff intended to be bound as special bail; held, in an action on the official bond of the sheriff, the plaintiff could maintain his action, and was entitled to recover the actual damages sustained. State v. Falls, 63 N. C. 188.

case where such commissioner has jurisdiction, although his decision is erroneous.¹ And, to render a sheriff liable for the escape of an insolvent surrendered in open court, it is necessary to show that such insolvent was committed to his custody by an order of the court. A mere prayer to that effect is not sufficient.²

§ 9. An officer, being liable for suffering an escape, is of course authorized to use force to prevent it. And where, in an action for assault and battery, the defendants justified under process, and it appeared on the trial, that the injuries complained of were committed on a recaption of the plaintiff, after one escape, and in efforts to overcome resistance, and to prevent another; the plaintiff alleging that *excessive force* was used: it was held, that the *onus* was on him to prove that the force was excessive.³ But an officer is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid.⁴ Although he is bound to use all reasonable and proper personal exertions to secure the party; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, though he used all such exertions as he deemed necessary at the time.⁵

§ 10. The amount of *damages* for an escape depends somewhat upon the form of action and the nature of the escape. In an action of *debt* for an escape, the measure of damages is the amount of the judgment.⁶ This action, however, has been expressly abolished in some of the United States. And it is said, the action of *debt* for an escape is founded upon two English statutes. A distinguished judge remarks, "There does not seem any reason to suppose that debt was a remedy for an escape, at the common law; for, according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive that the injury to the plaintiff, in cases of escape, could always be a sum certain. From the nature of the case, it is a tort, and sounding in damages, and perpetually varying in measure and extent. The statutes of West. and 2 Rich. II. were, in my judgment, introductive of new law."⁷ In conformity with these views it is held, that, in case of voluntary escape, the amount of the judgment is the measure of damages.⁸

¹ *Wiles v. Brown*, 3 Barb. 37.

² *Siler v. McKee*, 2 Jones, 379.

³ *Henry v. Lowell*, 16 Barb. 268.

⁴ *Whithead v. Keyes*, 3 Allen, 495.

⁵ *Ibid.*

⁶ 2 Greenl. Ev. § 599.

⁷ Per Story, J., *Steere v. Field*, 2 Mas. 513.

⁸ *Patten v. Halsted, Cox*, 277. See *State v. Hamilton*, 33 Ind. 502.

So, that when a creditor fails to collect the amount due on a jail bond, by reason of the poverty of the signers, he may sustain case against the sheriff, as for an escape; and the rule of damages is the amount of the debt. And the poverty of the signers is sufficiently proved by evidence that they have removed from the State, leaving no property within the State from which the collection of the debt could be enforced.¹

§ 10 *a*. But, on the other hand, the general rule is, that only the actual damage can be recovered;² predicated upon the amount of the party's property.³ And, upon this principle, no action lies for an escape on *mesne* process, unless the plaintiff could have maintained the original action.⁴ Nor, if the party is afterwards in custody, without proof of actual damage.⁵ But the admissions of the defendant in the original suit may be proved, to show a cause of action in such suit; even though after the escape. And the judgment obtained against him in the original suit, although by default, is admissible in evidence for the same purpose.⁶ Even in case of a *voluntary* escape of a debtor committed on *mesne* process, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt.⁷ So, in reference to *the burden of proof*, in an action for the escape of a debtor committed on execution, the plaintiff is not entitled to recover the whole amount of his debt, unless the defendant prove the debtor's inability to pay it; but only such an amount of damage, upon all the evidence in the case, as he has sustained by the escape.⁸

§ 11. For the escape from jail of a debtor, under a *ca. sa.*, nothing will excuse the sheriff but the act of God or the public enemy.⁹ The insufficiency of the jail is no defence.¹⁰ So a voluntary return before suit brought is not a defence in an action for an escape, whether negligent or voluntary, on *mesne process*, after return of the writ.¹¹ Nor an unreasonable delay of the creditor, after being apprised of the escape, to call for an assignment of the bond; if the sheriff were also apprised of the escape.¹² (*a*) So,

¹ Wheeler v. Pettes, 21 Vt. 398.

² Potter v. Lansing, 1 Johns. 215; Russell v. Turner, 7 Ib. 189; Governor v. Matlock, 1 Hawks, 425; Colby v. Sampson, 5 Mass. 310; Rawson v. Dole, 2 Johns. 454; Taylor v. Commonwealth, 3 Bibb, 356; State v. Baden, 11 Md. 317.

³ Spafford v. Goodell, 3 McLean, 79.

⁴ Riggs v. Thatcher, 1 Greenl. 68.

⁵ Planck v. Anderson, 5 T. R. 37.

⁶ Hart v. Stevenson, 25 Conn. 499.

⁷ Brooks v. Hoyt, 6 Pick. 468.

⁸ Chase v. Keyes, 2 Gray, 214.

⁹ State v. Halford, 6 Rich. Law, 58.

¹⁰ Kepler v. Barker, 13 Ohio St. 177.

¹¹ Stone v. Woods, 5 Johns. 182. See Richmond v. Tallmadge, 16 Johns. 308; Drake v. Chester, 2 Conn. 473.

¹² Wheeler v. Pettes, 21 Vt. 398.

(*a*) Nor, in an action against a party liable for the forthcoming of an execu-

tion debtor, is it necessary that demand should have been made upon the defend-

where a defendant detained under mesne process escaped, and the sheriff obtained leave to appear and defend the original suit, and judgment was recovered on a declaration filed against the original defendant: held, the plaintiff did not thereby elect to consider the defendant in custody, nor to discharge the sheriff; for the proceeding was wholly void, except to ascertain the extent of the sheriff's liability.¹ But it is held that the sheriff may prove in defence, that the debtor was *rescued* in going to jail.² (a)

¹ Scarborough v. Thornton, 9 Barr, 451.

² Bull. N. P. 68.

ant for the body of the debtor, on the execution issued in the original suit. Nor that the defendant should have had notice, that the execution was in the hands of an officer for service. Nor that the officer serving such execution should have retained the same during its life, to give the defendant a better opportunity to render the body of the debtor: the only rule being, that he should conduct fairly, and use due diligence to arrest the debtor, and return the execution in a reasonable time; and the question whether he has done so being wholly one of fact for the jury. And where the defendant has not tendered the body of the debtor within the life of the execution, he cannot complain that it was prematurely returned. *Hart v. Stevenson*, 25 Conn. 499.

(a) In an action for rescue, the return of the officer, that he had arrested the body of the debtor, and that he was rescued by the defendant, is not conclusive evidence of the fact. *Francis v. Wood*, 28 Me. 69.

And, in a late case, where a defendant in a *ca. sa.* bond was arrested by a constable and rescued by a mob, it was held, that this was an escape. *Abbott v. Holland*, 20 Geo. 598.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant. *Whithead v. Keyes*, 3 Allen, 495.

An officer who has negligently permitted an escape of a debtor whom he has arrested on mesne process, is not liable, if he retakes the debtor upon fresh

pursuit, and the debtor then forcibly rescues himself, or is forcibly rescued by others. *Whithead v. Keyes*, 1 Allen, 350.

In an action against the sheriff for an escape, he is not bound by the recital in the prisoner's petition for his discharge under the Insolvent Debtor's Act, but may show the contrary. *McKenzie v. Barnes*, 12 Rich. 205.

Where the sheriff was liable for having negligently permitted a slave to escape from his custody, whereby such slave was drowned; the proper measure of damages depended upon the interest, whether a life-estate or otherwise, of the owner in such slave. *Tudor v. Lewis*, 3 Met. (Ky.) 378.

When the accused is on bail, a verdict of guilty does not, of itself, terminate his right to his liberty, or place him in the custody of the sheriff, nor does it give to the sheriff any right to arrest or imprison him; hence a prosecution cannot be maintained, under such circumstances, against one who aids in the escape of the accused. *Redman v. State*, 28 Ind. 205.

A prisoner in a house of correction, under sentence, and kept in one of the usual cells in solitary confinement for refractory conduct, conformably to the rules, cannot maintain an action against the master for neglect to provide sufficient food, clothing, and fires, without evidence of malice or of such gross negligence as proves malice. *Williams v. Adams*, (Mass.) Law Reg., May, 1862, p. 436.

CHAPTER XXXII.

MISCELLANEOUS PUBLIC OFFICERS.

- | | |
|--------------------------------|------------------------------|
| 1. General official liability. | 7. Highways. |
| 2. Clerks of courts. | 9. <i>Military</i> officers. |
| 3. <i>Voting</i> . | 10. Miscellaneous cases. |
| 4. <i>Taxes</i> . | |

§ 1. It remains very briefly to notice the rights and liabilities of some other *public officers*. It is remarked in general terms, that, "if a *public officer* abuses his office, either by act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."¹ (a)

§ 2. Questions, similar to those which relate to sheriffs, charged with the execution of civil or criminal process, sometimes arise in reference to other *ministerial officers of courts*. Thus an action on the case was brought against a clerk of the Insolvent Debtors' Court, for wrongfully, maliciously, falsely, and unlawfully making out an order, purporting to be an order of that court for the discharge forthwith of an insolvent debtor, who was adjudged by the Quarter Sessions to be detained in custody for two years at

¹ Per Best, C. J., *Henly v. Mayor, &c.*, 5 Bing. 107.

(a) "The line which separates gross negligence from fraud in the discharge of official duty is very obscure and difficult of definition. A jury is at liberty to infer the latter from the former. There would seem to be no good reason why a public officer should be held responsible for fraud or malice, and be relieved from the consequences of unjustifiable neglect . . . He cannot be made responsible for an honest mistake of judgment, but for a reckless disregard of his duty and wilful negligence, resulting in serious damage, he ought, both upon reason and authority, to be held responsible." Per Thayer, J., *M'Kennan v. Bodine*, Leg. Intell., April 3, 1868.

A recent case in the Court of Claims contains a very elaborate and exhaustive view of the right of action for torts against public officers. This view is incidentally presented in maintaining the proposition,

that the Court of Claims may render judgment against the United States for the balance of a previous judgment under the Captured or Abandoned Property Act of Congress, the Secretary of the Treasury having reduced the amount and refused to pay the balance. *Brown v. U. S.*; Am. Law Rep. vol. 2, No. 3, March, 1872, p. 172.

Drainage commissioners, directed by statute to make and maintain a cut and sluice, are liable to an action for injury to land, caused by the bursting of a sluice through the negligence of their servants. But a provision, that damage or injury caused by any act of the commissioners, their agents, &c., shall be ascertained by a sheriff's jury, does not apply to unauthorized acts or to mere non-feasances. *Coe v. Wise*, Law Rep. (Eng.), November, 1866, p. 710; Exch. 1866; acc. *Mersey*, Law Rep. 1 H. L. 93.

the suit of the plaintiff; with an averment, that the Insolvent Debtors' Court did not pronounce any such order, or give any authority to the defendant to write, make out, or issue the same, whereby the prisoner was discharged forthwith, and by means whereof the plaintiff was injured, and had lost all means of enforcing payment of the debt and costs due to him from the prisoner. Upon writ of error, held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that court, until set aside, and that the declaration was not demurrable, for not averring that it was set aside.¹ (a)

§ 2 a. A town-clerk inadvertently gave a defendant a false certificate, officially attested, to support a plea of infancy, whereby the plaintiff was obliged to obtain a continuance of the cause. Before the next term, the defendant died. Held, the clerk was liable for the damages caused by such continuance and delay.²

§ 3. Questions sometimes arise as to the rights and duties of officers in connection with the privilege of *voting*. (See i. 78 and n.) Thus an action on the case lies by a burgess against the returning officer of a borough, for refusing his vote at an election of members of Parliament.³ Though it is held, that in such an action *malice* must be proved as well as laid. If a returning officer, without malice or any improper motive, but in the honest exercise of his judgment, refuse the vote of one entitled to vote at an election; no action can be maintained.⁴ But, it seems, a charge that the defendant, knowing, &c., and wrongfully intending to deprive the plaintiff, &c., hindered him from giving his vote, &c., is a sufficient allegation of malice.⁵ So, in Massachusetts, where a person who had been a member of a voluntary religious society demanded permission to vote, at a meeting of the first parish in the town where he dwelt, and produced to the presiding officer a certificate of the clerk of the voluntary society, that he had ceased to be a member thereof; it was held, that he was entitled to vote at the parish meeting (being otherwise duly qualified), and that

¹ *Whitelegg v. Richards*, 3 Dowl. & Ry. 237.

² *Maxwell v. Pike*, 2 Greenl. 8.

³ *Ashby v. White*, 1 Brown, P. C. 62.

⁴ *Tozer v. Child*, 40 Eng. L. & Eq. 89;

1 E. 563; *Goetchens v. Matthewson*, 5 Lans. 214; *Friend v. Hamill*, 34 Md. 298.

⁵ *Drewe v. Coulton*, 1 E. 563. See *People v. Pease*, 30 Barb. 588; *State v. Hart*, 6 Jones, 389.

(a) A, an attorney, demanded of a clerk of court to issue a summons and attachment, forthwith, against B, and then left the office. While he was absent, an attachment demanded by another attorney against B was issued and served, but the

writ was ready for A when he returned. Held, although the clerk was guilty of a technical breach of duty, A was not injured by the breach. *Lick v. Madden*, 36 Cal. 208.

an action lay against the presiding officer, for refusing to receive his vote.¹ (a)

§ 4. *Taxation* gives rise to another class of rights and liabilities; whether in reference to the officers who *impose* or *assess*, (b) or those who *collect* them. Thus trespass lies against selectmen for seizure of person or property, made to enforce payment of a tax illegally assessed.² So trespass is the proper form of action to be brought against the trustees of a school-district, by one against whom they have illegally assessed and ordered to be collected a school tax.³ So case lies against selectmen for illegally assessing and collecting taxes.⁴ (c) But the distinction is made, that assessors are liable, if they exceed their authority, though not for mere errors.⁵ Thus the assessors of a town are held liable only for a want of integrity and fidelity, and not for a mere error in taxing a person not an inhabitant of the town.⁶ They are held not liable for any judicial act.⁷

§ 4 a. In an action against an assessor, for an imprisonment

¹ Oakes v. Hill, 10 Pick. 333.

² Osgood v. Blake, 1 Fost. 550.

³ Crandall v. James, 6 R. I. 144.

⁴ Osgood v. Clark, 6 Fost. 307; Perry v. Buss, 15 N. H. 222. See Griffin v. Rising, 2 Cush. 75.

⁵ Clark v. Norton, 49 N. Y. 243. See Parish v. Golden, 35 N. Y. 462.

⁶ Durant v. Eaton, 98 Mass. 469; Brown v. Smith, 24 Barb. 419.

⁷ Dorn v. Backer, 61 Barb. 597; Buffalo v. Erie, 48 N. Y. 93; Western v. Nolan, 48 N. Y. 513.

(a) It is competent for selectmen, although not their duty, to add the name of a legal voter to the voters' list after the voting commences; but they cannot during such time hold a regular meeting for the correction of the list. Waite v. Woodward, 10 Cush. 143.

An action lies against an election inspector for unlawfully preventing a party from voting. Anderson v. Milliken, 9 Ohio, 568.

Though a party produce to selectmen *prima facie* evidence of a right to vote, he can maintain no action for the refusal of his vote, if in fact he had no such right. The only effect of the late statutes upon the subject (in Massachusetts) is, to exempt selectmen from liability without the production of *prima facie* evidence, but not to preclude them from going behind such evidence, and showing the actual absence of the right. Lombard v. Oliver, 3 Allen, 1.

(b) In Massachusetts, assessors are liable, notwithstanding Rev. Stats. c. 7, § 44, for assessing, and issuing a warrant for the collection of a school-district tax, if the school-district was not legally organized, although it was certified to them, by one acting as clerk of the dis-

trict, that the tax had been voted by the district. Dickinson v. Billings, 4 Gray, 42.

So assessors, who place upon their roll the name of a person not liable to taxation in their town or district, in consequence of which his property is levied upon for the taxes, are responsible to him for damages. Mygatt v. Washburn, 1 Smith, N. Y. 316. See Herrinan v. Stowers, 43 Me. 497.

If a district clerk, in giving notice of a special district meeting regularly called by the trustees, misrepresent the object of the meeting to some of the taxable inhabitants, who in consequence thereof omit to attend, and a district tax is voted at such meeting; the trustees, who cause the tax to be collected, are not thereby rendered trespassers, unless they are parties to the fraud. Randall v. Smith, 1 Denio, 214.

(c) In case, the unlawful assessment being the gravamen of the action, the particular matter in which the unlawfulness consists should be set forth and proved specifically. Nor will the introduction of general averments of the illegality, &c., change the burden of proof. 15 N. H. 222.

of the plaintiff for non-payment of a school-district tax, alleged to be illegal for want of legal school districts in the town; if the arrest is admitted or proved, the burden is on the defendant to prove that the entire town was legally districted by territorial limits. This burden is not shifted, by proof of the existence of districts *de facto* for more than forty years throughout the entire town; nor by proof that a town record book, now lost, contained a record of a districting of the entire town; it not appearing that such record was made after the statute which required territorial districts.¹

§ 5. An action does not lie for the recovery of personal property subject to execution, when it is taken by the proper officer by virtue of a tax warrant duly issued.² So if the law under which an assessment is made is constitutional, a collector is not liable for executing a warrant merely because the board of assessors committed an irregularity in the manner of the assessment in carrying out the auditor's direction.³ But an unauthorized sale of property by a collector of taxes amounts to a conversion, and the owner may maintain trover against him.⁴ And where a collector, by virtue of an assessment warrant, levied upon the goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, and gave him notice that he would sell on a day specified, if he did not previously pay; held, payment, made when the collector was about to remove the goods for sale, was not voluntarily made, and the collector was liable in trespass.⁵ So, in an action for assault and battery and false imprisonment, where the defendants, by plea, attempted to justify, under a warrant of distress for the collection of taxes, and it appeared by the plea that the warrant was attempted to be executed more than three years after it was delivered to the collector, and no sufficient excuse was set forth for such delay; held, the plea was fatally defective, unless the defect was supplied in the replication.⁶ So the heirs-at-law of an estate gave a chaise and money belonging to the estate in exchange for another chaise. A collector of taxes sold the chaise, as the property of the heirs, for non-payment of an illegal tax assessed against them. Held, that trespass would lie in favor of the heirs against the collector, and, as the adminis-

¹ Bassett v. Porter, 10 Cush. 418.

² Hudler v. Golden, 36 N. Y. 446.

³ Glasgow v. Rowse, 48 Mo. 479; Gove v. Mastin, 66 N. C. 371; Jefferson v. Opel, 49 Mis. 190.

⁴ Thompson v. Currier, 4 Fost. 237.

⁵ Wetmore v. Campbell, 2 Sandf. 341.

See Lucas v. San Francisco, 7 Cal. 463.

⁶ Shaw v. Peckett, 25 Vt. 423.

trator had not ratified the sale, and as no persons in interest had objected, that the defendant could not now object to the right of the plaintiff to maintain the action; also, that, as the tax was illegal, the possession of the plaintiffs was sufficient to enable them to maintain trespass against the defendant, who had no right to take the property.¹ In a late case the distinction is made, that a collector is not liable unless the assessment is simply void. Thus he is not liable for levying on land within town limits, regularly assessed for town taxes, although used exclusively for farming.²

§ 6. Questions also arise in reference to the title of property illegally taken for taxes. Thus A, residing in another State, owned a building in Lawrence, in Massachusetts, standing by consent on the ground of another person. The building was taxed to A, in Lawrence, as real estate belonging to a non-resident, but was subsequently sold by the tax-collector as personal property. Held, the purchaser was liable in trespass for entering the building without A's consent.³ But a deed, duly acknowledged and registered, from an officer whose duty it is to sell land for non-payment of taxes, gives a title sufficient to enable one holding under the grantee to maintain trespass against a mere stranger.⁴ (a)

§ 7. In New York, no action will lie against an *overseer of highways* (see chap. 39), in favor of a private individual, for an injury sustained in consequence of the neglect of the overseer to keep a bridge in repair. The party injured can sue only for the statutory *penalty*, for each neglect or breach of duty. And, if an action would lie, it must be on the statute; and the declaration ought to state specially the cause of action arising under the statute, and every fact necessary to enable the court to judge whether there has been a breach of duty. Not, generally, that the defendant was an overseer of highways, and wilfully neglected his duty and suffered the bridge to remain out of repair, whereby the plaintiff's

¹ Pickering v. Coleman, 12 N. H. 148.

² Walden v. Dudley, 49 Mis. 419.

³ Flanders v. Cross, 10 Cush. 514.

⁴ Wentworth v. Blanchard, 37 Me. 14.

(a) It is held in Michigan, that trespass does not lie against a supervisor of taxes, for errors or defects in the description of real estate on the assessment roll. Clark v. Axford, 5 Mich. 182.

In Ohio, where a county auditor places property subject to taxation on the duplicate within proper time, and assesses it according to St. 1852, § 46, without notice to the interested party, the treasurer is not a trespasser in collecting such tax, unless the want of notice is disclosed

by the duplicate, or known to him. A county treasurer is protected by his duplicate, under the same circumstances as an officer by process. Champaign, &c., v. Smith, 7 Ohio, N. S. 42.

In Indiana, where trespass is brought against a supervisor, executing powers given by the Rev. Sts. 1843, he is bound to show that he acted in good faith, and in a proper discharge of his duty to the public. Conwell v. Emrie, 4 Ind. 209.

horse fell through, &c. And such a declaration is not aided by a verdict; being the case, not of a title defectively set forth, but a total defect of title.¹

§ 8. A surveyor is justified in executing an order of a county court, having jurisdiction, requiring him to open a road, though such order is irregularly made.² But under the statute requiring road-warrants to be signed by the supervisors, a copy of a warrant signed by them, made at their request by their clerk, but not in their presence, will not justify an officer in proceeding under it.³ (a)

§ 9. Cases may also arise, involving the rights and duties of *military* officers. Lord Mansfield is reported thus to have charged a jury: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, — if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, — they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust."⁴ So the defendant went to the place of rendezvous for the impress service, and gave information that the plaintiff, being at a certain house, was liable to impressment and a fit person for the service; in consequence of which the plaintiff was seized by the press-gang and

¹ Bartlett v. Crozier, 17 Johns. 439.

² Yeager v. Carpenter, 8 Leigh, 454.

³ Mericle v. Mulks, 1 Wis. 366.

⁴ Wall v. M'Namara, cited 1 T. R. 536.

(a) In Indiana, where parties open a road under an order of commissioners, void on its face, proceedings before them are inadmissible to mitigate damages, in an action of trespass for such opening. *Barnard v. Haworth*, 9 Ind. 103.

In an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. *Guptail v. Teft*, 16 Ill. 365.

carried on board the tender, where he was detained, until it was ascertained that he had never been before in a ship but once, which was also a case of unlawful impressment. Held, a proper case for an action of trespass and false imprisonment. Lord Ellenborough remarked: "This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant, therefore, was a trespasser in procuring it to be done; nor is any proof of malice necessary."¹ So case or trespass lies against a military officer, for a seizure of goods or arrest of the person, by virtue of a warrant for a fine, illegally issued by such officer.² So it is held that replevin lies, for property taken by virtue of a warrant, issued by a court-martial of the United States, to the marshal of the district, to collect a fine imposed by the sentence of the court upon the plaintiff, as a private in the militia of the State of New York, for refusing to rendezvous and enter the service, in obedience to the orders of the commander-in-chief of the militia, &c.³ But, where a soldier had been arrested and committed to the custody of the commandant of a garrison, who ordered him to do certain duty which was reasonable, and warranted by military usage; it was held that the disobedience of the soldier justified the officer in commanding him to be tied to a gun; and that it was a defence to an action for false imprisonment.⁴ (a)

¹ *Flewster v. Royle*, 1 Camp. 187.

² *Bixby v. Harris*, 6 Fost. 125.

³ *Mills v. Martin*, 19 Johns. 7. But see *Martin v. Moot*, 12 Wheat. 19.

⁴ *Schuneman v. Diblee*, 14 Johns. 235.

(a) A recent case in Massachusetts (*Ela v. Smith*, 5 Gray, 121) has settled several important principles, in reference to the respective and concurrent rights and duties of the civil and military authorities of a city, a State, and the United States, in case of riotous resistance to the execution of civil process of the United States Court. The case was one of peculiar interest and notoriety, as it pertained to the exciting subject of the rendition of a fugitive slave; but, as it turned, to a great extent, upon the construction of a State statute, does not require to be cited at length in the present work.

A defendant in trespass, justifying under the (U. S.) act of Feb. 27, 1866, may show that the seizure was under the orders of any civil or military officer of West Virginia or of the United States, or in aid of the purposes and policy of the authorities, in retarding, checking,

and suppressing the late rebellion. *Hess v. Johnson*, 3 W. Va. 645.

Where, on the 17th of May, 1865, a lieutenant and a private in the army of the United States, by command of their captain, took from the possession of a person two horses, held a trespass. *Wilson v. Franklin*, 63 N. C. 259.

An unlawful act cannot be justified by an unlawful authority to do it. So held, where a captain of a company of State troops, in 1865, by orders of an acting quartermaster, took and destroyed property without rendering compensation. *Hogue v. Penn*, 3 Bush, 663.

Where a soldier in the confederate army took from a federal soldier his horse, sold it, and applied the proceeds to his own use, the horse having never been used in military service; held, a conversion. *Barnhill v. Phillips*, 4 Cold. 1.

In an action for the taking and con-

§ 10. It has been held, that an action on the case will not lie at common law against a *returning officer*, for falsely returning a candidate for a seat in Parliament.¹ (a) But, in general, case will lie for a false return in the matter of an election to an office.² So an action on the case lies against the *commissioners of a lottery*, for not adjudging a prize to the holder of a ticket entitled to receive it.³ Or against a *postmaster* for not delivering a letter on request, though no particular damage accrued. Otherwise if the letter had been tendered, and the plaintiff would not pay the postage.⁴ So a notary public, who undertakes to protest a note and notify the parties, for a compensation, is liable, if he negligently fails to give due legal notice.⁵ So if a notary, in taking the acknowledgment of a deed, neglect to state in his certificate that the party was personally known to him, or properly identified, he is guilty of gross negligence, for which he is responsible.⁶ It is no excuse, that the blank certificate had been partly filled up by the grantee's attorney. It is the duty of the notary, to see to it that the certificate is correct. It is as faulty to sign without reading it, as to sign an incomplete one.⁷ So an *officer of customs* is liable in trespass for a wrong seizure of goods, and carrying them to the king's warehouses, notwithstanding probable cause.⁸ And an officer of the revenue, seizing goods as forfeited, and causing them to be libelled and tried, in an action of trespass by the owner, can only plead a condemnation, or an acquittal with a certificate of probable cause.⁹ (b)

¹ *Prideaux v. Morrice*, 7 Mod. 14.

² *Reg. v. Heathcote*, 10 Mod. 48.

³ *Schinotti v. Bumsted*, 6 T. R. 646.

⁴ *Edwards v. Dickenson*, 12 Mod. 6.
See 3 How. (U. S.) 97.

⁵ *Bowling v. Arthur*, 34 Miss. 41. See chap. 35, § 2 b.

⁶ *Fogarty v. Finlay*, 10 Cal. 239.

⁷ *Ibid.*

⁸ *Leglise v. Champante*, 2 Str. 820.

⁹ *Gelston v. Hoyt*, 13 Johns. 561.

version of a wagon and two mules by the defendant, a confederate soldier, under orders of a superior officer, from the plaintiff, who was a peaceful citizen, engaged in no act of hostility toward either party, but in the discharge of his ordinary duties; held, the act was unlawful, the orders were no defence, and the defendant was liable. *Yost v. Stout*, 4 Cold. 205.

(a) An action cannot be maintained by A against a county clerk and his sureties for his refusal to cast up the votes at an election for the office of collector, and for the issue of the certificate of election to B. *State v. Sherwood*, 42 Mo. 179.

(b) Trespass does not lie against excise officers, who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found. Nor are the defendants bound to show reasonable grounds of suspicion. But case lies for maliciously obtaining or executing the warrant. *Boot v. Cooper*, cited in 1 T. R. 535; 4 Doug. 339. An importer can maintain trover against a collector of customs who unlawfully detains goods, notwithstanding the instructions of the Secretary of the Treasury. *Fiedler v. Maxwell*, 8 Blatch. 552.

A town-agent for the sale of liquor, appointed under (Mass.) Gen. Sts. c. 86,

§ 17, is not liable in damages for refusing under any circumstances to sell intoxicating liquor. *Dwinnels v. Parsons*, 98 Mass. 470.

An action was held to lie against an inspector of flour, for negligently inspecting and erroneously branding barrels of flour belonging to A, whereby the plaintiff was induced to purchase the flour, which proved to be unmerchantable; the purchase having been conditioned upon an inspection by the defendant and a

branding of the flour as merchantable. *M'Kennan v. Bodine*, Distr. Ct. Phila., Leg. Intell., April 3, 1868. See *Nickerson v. Thompson*, 33 Me. 433; *Seamen v. Patten*, 2 Caines, 312.

A town committee is not liable for inadvertently pointing out to a road-contractor an erroneous location of his section. *Nickerson v. Dyer*, 105 Mass. 320.

As to liability for certifying an acknowledgment, see *Ware v. Brown*, 2 Bond, 267.

CHAPTER XXXIII.

JOINT TORTS OR WRONGS.

1. Mutual rights and liabilities of parties jointly interested, as between themselves and in reference to others.
2. Suit of one joint owner against another. — Sale or destruction of the property.
3. Members of a voluntary association.
4. Tenants in common of real property; possession of one, when adverse to another.
5. Third person claiming under one tenant in common.
7. Suits by joint parties against third persons.
9. Suits against joint parties. — Trespassers.
- 9 a. Conversion.
- 9 c, 10 c. The question of joint liability is for the jury.
10. Qualifications of the general rule of joint liability. — trespass.
- 10 a. Conversion.
- 10 b. Mistake.
12. Officers and parties in case of legal process.
16. Conspiracy.
20. Election of remedies; several suits, whether allowable; liability of different defendants in the same action; verdict; damages.
- 30 n. Liability of *partners*.

§ 1. HAVING completed our view of torts or wrongs, consisting in a violation of the duties incident to *public* relations, we proceed to consider those connected with *private* relations. And one of the most obvious and frequent relations of this class, — including also, or alike applicable to, all or most others, — is that of a *joint* interest, claim, or liability, in connection with the subject-matter of suit. This relation may be brought in question, in suits between the parties jointly concerned, themselves, or between them, or one or more of them, and third persons.

§ 2. It was formerly held, as a general rule, that one joint-tenant, tenant in common, or coparcener, cannot maintain trespass or trover against his companion; although he might maintain such action against a stranger, unless the joint-tenancy be pleaded in abatement.¹ The rule is still in force to the extent, that trespass does not lie, except for *mesne profits* or the destruction of the property.² (a) Also that trover does not lie between joint-tenants, &c.,

¹ Brown v. Hedges, 1 Salk. 290. See State v. Marsh, 64 N. C. 378.

² Bennet v. Bullock, 35 Penn. 364; Critchfield v. Humbert, 39 Penn. 427.

(a) And where one of two tenants of common land, being in the sole possession, proceeded to clear all the arable land, and by a succession of crops wore it out, and left no timber to repair fences; held, the remedy was not an action on the case, in the nature of waste, but an action of account, or a bill in equity for an account. Darden v. Cowper, 7 Jones, 210.

A bill for partition, and for an injunction against cutting timber trees, on land owned by the plaintiffs and defendants in common, does not lie, without an averment of the insolvency of the defendants, or that they had cut or disposed of timber to an extent exceeding their share of the estate. Hihn v. Peck, 18 Cal. 640.

Recovery in trover by one joint tenant

unless the joint property is *destroyed*,¹ or *sold*.² Or, that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to amount to a destruction of it, or something equivalent, mediately or immediately;³ or to an exclusion of the plaintiff's right;⁴ or to render it impossible that the plaintiff should ever take and use it. The party must have used it otherwise than in the usual and legitimate mode.⁵ Thus the conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action.⁶ So the secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them, and applying the proceeds to his own use, does not amount to a conversion; nor is it an unlawful act, for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party.⁷ So one tenant in common cannot maintain trover against his co-tenant, for crops in which they have a joint interest, until a separation or severance by the parties, or until such a conversion as goes to the destruction of the crop, or the entire exclusion of the co-tenant from the enjoyment of his right and interest therein.⁸ (a) So the owner

¹ *Lucas v. Wasson*, 3 Dev. 398; *Rodermund v. Clark*, 46 N. Y. 354; *Campbell v. Campbell*, 2 Murph. 65; *Leonard v. Scarborough*, 2 Kelly, 73; *Roston v. Morris*, 1 Dutch. 173; *Barton v. Burton*, 1 Williams, 98.

² 8 Barb. 585.

³ *Roston v. Morris*, 1 Dutch. 173; *Heath v. Hubbard*, 4 E. 110.

⁴ *Allen v. Harper*, 26 Ala. 686.

⁵ *Dodd v. Watson*, 4 Jones, Eq. 48.

⁶ *Fennings v. Ld. Grenville*, 1 Taunt. 241; *Mayhew v. Herrick*, 7 Com. B. 229.

⁷ *Jones v. Brown*, 38 Eng. L. & Eq. 304.

⁸ *Carr v. Dodge*, 40 N. H. 403; *Keisel v. Earnest*, 21 Penn. 90.

against the other has the effect of a partition of the whole property, if the defendant so desire; and, in that case, if the plaintiff has exclusive possession of more than his share, he cannot recover, though the defendant has such exclusive possession of another portion, as amounts to an ouster of his co-tenant, and a conversion. *Roddy v. Cox*, 29 Geo. 298.

(a) If one having no interest in, or possession or control of, a chattel, owned by two others in common, sell an undivided half of it to one of the owners, who thereupon carries it out of the State; the other tenant in common cannot maintain trover against such third person in consequence of such sale. *Bates v. Marsh*, 33 Vt. 122.

Where the nature of the action itself implies the continued existence of the property, and the defendant's present possession of it; the exception to the general rule stated in the text, against the right of action between joint owners, is of course inapplicable. Thus one tenant in common of a chattel cannot maintain *detinue* for such chattel against his co-tenant. *Bonner v. Latham*, 1 Ired. 271.

So, where several have interest in a deed, the title to the possession of it is *ambulatory*; and any of the parties interested, having possession, may retain it against the other. *Foster v. Crabb*, 11 Eng. L. & Eq. 521.

And, upon similar ground, where one

farming with the tenant on shares cannot maintain trover for his share of the products, without proof that the latter has sold or destroyed them.¹ So one tenant in common cannot maintain either trover or trespass against another, who entered, put a lock on the gate, cut the grass, made it into hay, and carried away the hay.²

§ 2 *a*. But, as already suggested, if the subject-matter be actually *destroyed* by one tenant in common, trover will lie against him by his co-tenant. And where one tenant in common, the defendant, forcibly took a ship out of the possession of the other, the plaintiff, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage, where it was lost; it was held to be properly left to the jury, whether the destruction was not by the defendant's means.³ So one tenant in common of personal property has no right to *sell* the property. He can only sell his own interest; and, if he undertakes to sell the entire property, he is liable to an action of trover, at the suit of his co-tenants; or they may sue, or take the property from the purchaser.⁴ (a) The assuming to own or sell the whole is sufficient evidence of conversion.⁵ So a disposition to one's "own use" is held to be a conversion, whether by a tenant in common or otherwise.⁶ Or removal of the property, and using it for pri-

¹ Williams v. Nolen, 24 Ala. 167.

² Jacobs v. Seward, L. R. 5 H. L. 464.

³ Barnardiston v. Chapman, cited in 4 E. 121. See Fiquet v. Allison, 12 Mich. 328.

⁴ White v. Brooks, 43 N. H. 402; Ty-

ler v. Taylor, 8 Barb. 585; Perminter v. Kelly, 18 Ala. 716.

⁵ Wheeler v. Wheeler, 33 Me. 347; Smyth v. Tankersley, 20 Ala. 212; Weld v. Oliver, 21 Pick. 559.

⁶ Webb v. Mann, 3 Mich. 139.

of two joint owners of a vessel took upon himself the management, direction, and control of the whole vessel, and by his carelessness, inattention, and negligent and improper conduct, the vessel took fire and was consumed; it was held that he was not liable to the other joint owner, even though he assumed the management, &c., without the license or consent of the other. Moody v. Buck, 1 Sandf. 304.

(a) It has however been said, that one tenant in common of a chattel cannot maintain trover for it against his co-tenant *while the right of recaption remains*; otherwise, when that right has been put an end to by the act of the co-tenant. Thus, where a vessel belonging to part-owners was forcibly taken by the minority out of the possession of the majority, and sent upon foreign voyages, on one of which it was ultimately lost; held, that trover could be maintained. Knight

v. Coates, 1 Irish, L. R. 53. See 4 E. 110.

One co-tenant, who has wrongfully sold timber from the land, cannot set up as a defence that the other had previously done so, and that the present defendant took his proportion of the price of the previous sale. Dwinell v. Larrabee, 38 Me. 464.

Where the master and part-owner of a schooner, landing at Matamoras, on false information of the consignee of the cargo, that there was a rebel plot to seize and destroy her, and on his advice, transferred her to a British subject, in the absence of any showing that such peril was in fact threatened, and while a United States gunboat was lying ten or twelve miles distant; held, an unlawful conversion of the vessel, although another vessel, a few weeks previously, had been there so seized and destroyed. Brightman v. Eddy, 97 Mass. 478.

vate purposes of his own; as in case of a machine for manufacturing lumber.¹ So one tenant in common may maintain an action for conversion against another, who takes possession of *shot iron*, jointly owned by them, mixes it with other iron, and manufactures the mixture into various iron wares, making it impossible to trace or identify the iron, and sells or disposes of the wares.² More especially, trover lies by one tenant in common of a personal chattel against his co-tenant, for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed by the use thereof.³ Or where one of two joint-owners of personal property misuses it, by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which it was held by both; or delivers it wrongfully to a stranger, for purposes inconsistent with the uses for which it was designed, and such stranger denies the title of the other, and claims the exclusive possession and ownership.⁴

§ 2 *b*. But although, if personal property held in common be sold by one of the tenants in common as if exclusively his own, the co-tenant may maintain trover against him; in case the purchaser also sells and delivers the property as his own, he may also maintain trover against such purchaser. And the measure of damages will be the value of the property at the time of the latter sale. Nor will the plaintiff ratify the sale, and waive his right to an action of trover against the defendant, by making out a bill of his proportion of the price against the defendant, and calling on him, as he had taken the property, after he had been informed it belonged to the plaintiff, to pay for it, and save himself further trouble and expense.⁵ (*a*)

§ 3. The general rule on this subject has been applied, as between members of voluntary, unincorporated associations. Thus a member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person who take it from

¹ *Benedict v. Howard*, 31 Barb. 569; *M'Clellan v. Genness*, 11 Am. Law Reg. 134. But see *Jones*, Eq. 48.

² *Redington v. Chase*, 44 N. H. 36.

³ *Lowe v. Miller*, 3 Gratt. 205.

⁴ *Agnew v. Johnson*, 17 Penn. 373.

⁵ *Weld v. Oliver*, 21 Pick. 559; 43 N. H. 402.

(*a*) If two persons agree to cultivate land on shares, each has a right to go upon the premises, by himself and his authorized agents, for the purpose of removing his share of the crops; and if the agent of one of them goes upon the premises for this purpose, and is endeavoring to take the share of his principal

from a cart in which the other has deposited crops gathered by him, a servant of the latter who forcibly removed such agent from the land by his master's orders is guilty of an assault and battery. *Com. v. Rigney*, 4 Allen, 316.

him.¹ So, where the majority of a fire company, owning certain property, voted to disband, and appointed a committee to remove the property; and a minority of the company remained, and filled up the company with other persons, and then united with the new members in an action of replevin against the committee: held, the action could not be maintained.²

§ 3 *a*. But where an agreement was made and executed by and between certain persons named therein of the first part, and the several members of a volunteer company of militia (of which the parties of the first part were also members) who should sign the same of the second part; by which, after reciting that the parties of the first part had purchased uniforms and equipments for the company, those parties agreed to sell the same to the parties of the second part at the cost price thereof and interest, and the several parties of the second part, each for himself, agreed to buy such uniforms and equipments, and to pay for them by annual instalments of the money severally receivable by them for the performance of military duty; and that, until such payment, the several uniforms and equipments should be and remain the property of the parties of the first part: in an action of trover for a set of uniform and equipments by the surviving parties of the first part (two of whom died before the commencement of the action) against one of the parties of the second part, who was not also one of the parties of the first part; it was held, that, as between the parties to the suit, the agreement was not void or incapable of being enforced, on the ground that the parties of the first part were also parties of the second part.³ (*a*)

§ 4. In reference to real as well as personal estate, inasmuch as, in the case of *joint heirs*, there is a *privity of estate* between the

¹ Holliday v. Camsell, 1 T. R. 658.

³ Morley v. French, 2 Cush. 130.

² Taylor v. True, 7 Fost. 220.

(*a*) Where three tenants in common constructed a basin communicating with a public canal, and laid out six lots of the width of thirty-five feet each, facing upon one side of the basin; dividing the lots between them by each taking two, and giving to each proprietor the privilege of erecting warehouses upon his lots, extending the same to the basin; and the grantee of one of the original proprietors built a pier in the basin in front of his lot, on the line between it and the lot of the grantee of another original proprietor, whereby the latter was obstructed in the convenient use of the waters of the basin,

i.e., in the lading and unlading of canal-boats and their passage to and from his wharf: it was held that the owner of each lot was entitled to the use of the waters of the basin, by laying a canal-boat in front of his lot, extending over in front of his neighbor's lot, when such neighbor was not occupying the basin in front of his lot in its appropriate use, and that for a permanent obstruction in such use of the waters of the basin, by the erection of a pier, an action on the case might be sustained. *Beach v. Child*, 13 Wend. 343.

parties, and as each joint owner has the same right of possession of the whole property: the general rule is, that such possession and use by one, though exclusive of itself, furnishes no ground of action against him by the other; but such possession enures to the use of the latter, unless proved to be adverse.¹ (a) One tenant cannot sue his fellow, except in case of *actual ouster*, either proved or admitted by the pleading.² And one cannot be ousted by the other, except by a notorious and continued possession, unequivocally hostile,³ or an act inconsistent with the plaintiff's right in the premises.⁴ The burden is on the party alleging an ouster, to prove it. There must be an actual ouster, either forcible, or in some way brought home to the knowledge of the plaintiff as an ouster. It cannot arise from mere possession, when both tenants suppose the whole title to be in the possessor.⁵ Thus where a party entered under a deed purporting to convey the entire land, although in fact it conveyed only an undivided portion of it, and enjoyed exclusive actual possession under the belief that the deed conveyed the whole title; held, not an ouster of the other owner.⁶ So, where a tenant in common mortgaged the whole estate, and remained in actual possession, and there was evidence that he did not intend to oust his co-tenant; it was held that the mortgage did not operate as a constructive ouster, if the mortgagor's intention was not to hold adversely to his co-tenant; and that the question of intention should be left to the jury.⁷ And trespass does not lie by one tenant in common against another, for disturbing a temporary rightful possession.⁸ Thus one tenant in common of a saw-mill cannot maintain this action against another, for his entry into the entire common property and exclusive occupation thereof.⁹ Nor can trespass for mesne profits be maintained by one tenant in common against another, without an actual ouster.¹⁰ Nor will a constructive ouster, by an heir claiming the whole estate under a

¹ Bennet v. Bullock, 35 Penn. 364; 8 B. Monr. 177; Cray v. Campbell, 24 Cal. 637; McCall v. Reybold, 1 Harr. 146; Ewer v. Lovell, 9 Gray, 276; Hodgdon v. Shannon, 44 N. H. 572; Tulloch v. Worrall, 49 Penn. 133; Filbert v. Hoff, 42 Penn. 97. See King v. Dickerman, 11 Gray, 480; Ashley v. Warner, 11 Gray, 43; Alexander v. Kennedy, 19 Tex. 488; Florence v. Hopkins, 46 N. Y. 182.

² Halford v. Tetherow, 2 Jones, 393.

³ Peck v. Ward, 18 Penn. 506; Gill v. Fauntleroy, 8 B. Monr. 177.

⁴ Lawton v. Adams, 29 Geo. 273.

⁵ Van Bibber v. Frazier, 17 Md. 436.

⁶ Seaton v. Son, 32 Cal. 481.

⁷ Moore v. Collishaw, 10 Barr, 224; 44 N. H. 572.

⁸ Duncan v. Sylvester, 1 Shep. 417.

⁹ Porter v. Hooper, 1 Shep. 25.

¹⁰ Ibid.

(a) As to third persons, the possession of one tenant in common is that of all. Therefore, where two are in possession

and only one is turned out, his possession continues that of both. Bernecker v. Miller, 40 Mo. 473.

supposed devise, sustain an action of trespass brought against him by the coheir.¹ So trespass *qu. cl. fr.* cannot be maintained by one tenant in common of land against another, for entering upon the common property under a claim of exclusive ownership of the whole, and cutting and carrying away all the timber thereon.² (a)

§ 4 a. But the severance and removal of machinery from a mill, which was attached to it by spikes, bolts, and screws, and worked by belts running from the permanent shafting driven by the water-wheel, and its incorporation with another mill, by one co-tenant without the assent of the other, is such a practical destruction of the common property that an action of trespass may be maintained.³

§ 4 b. And a tenant in common of land, actually ousted or expelled from his possession by a co-tenant, may maintain trespass *qu. claus.* against him, although the defendant admits the right of the plaintiff, and offers to account.⁴ So the owner of real estate, in possession, may maintain trespass against one also in possession, and claiming title as a tenant in common with him.⁵ And although a defendant may have a right of possession as tenant in common, yet, in trespass *qu. claus.*, a plea of soil and freehold is not supported by evidence of such tenancy.⁶ So a tenant in common can bring ejectment, when there is an actual ouster.⁷ Adverse possession, by a joint-tenant, from the commencement of the other's claim is a disseisin.⁸ Stronger evidence is required than in case of a stranger. But when some of the co-tenants are turned out, and the others, being thereupon placed in possession, continue to hold the land, such holding must be considered adverse.⁹ The possession of one tenant in common may become

¹ Allen v. Carter, 8 Pick. 175.

² Wait v. Richardson, 33 Vt. 190.

³ Symonds v. Harris, 51 Me. 14.

⁴ McGill v. Ash, 7 Barr. 397; Murray v. Hall, 7 Com. B. 441. See Brown v. Combs, 5 Dutch. 36; Owen v. Morton, 24 Cal. 376; Thornton v. York, &c., 45

Me. 158; Wright v. Saddler, 20 N. Y. (6 Smith) 320.

⁵ Hunting v. Russell, 2 Cush. 145.

⁶ Roberts v. Dame, 11 N. H. 226.

⁷ Johnson v. Swain, Busb. 335. See Cross v. Robinson, 21 Conn. 379.

⁸ Brock v. Eastman, 2 Wms. 658.

⁹ Barret v. Coburn, 3 Met. (Ky.) 510.

(a) A tenant in common of unimproved timber lands, who cuts and removes timber and converts it to his own use, is liable for waste to his co-tenant, under the (N. Y.) statute giving the action of waste to one tenant in common against another. Elwell v. Burnside, 44 Barb. 447.

Maine Rev. Sts. c. 95, § 16, which modifies the common law as to the remedy of one tenant in common against his co-tenant, applies both to cases of per-

sonal occupancy, and where a tenant receives rent from a subtenant. Cutter v. Currier, 54 Me. 81.

An action may be maintained, even if the defendant did not occupy the whole of the joint estate. Ibid.

A tenant in common may maintain an action against his co-tenant, under (Mass.) Gen. Sts. c. 137, for forcible entry and detainer. Presbrey v. Presbrey, 13 Allen, 281.

antagonistic, and exclusive of a co-tenant, and will become so, by an unequivocal and notorious denial of the right of the co-tenant, and a refusal to pay him any part of the profits.¹ So a joint owner, holding possession adversely to his co-owners, and in such a manner as to apprise them of the adverse nature of his possession, by lapse of twenty years acquires a separate right, available against them, and sufficient to maintain an action for possession in his own name.² And although the perception of the entire profits by one tenant in common is not of itself sufficient to divest the possession of his co-tenant, nor are acts of ownership by one tenant in common necessarily to be construed into acts of disseisin; yet an undisturbed and peaceable occupancy of the premises by one for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the right of the other, is sufficient to raise the presumption of an actual ouster. So, where one tenant in common of an equitable title, after the abandonment of possession by both, and their removal from the State, returned and made a new and distinct contract of purchase with the vendor, from whom he received a deed to himself individually, which he had duly recorded; the mere fact that he, about the same time, caused the original unexecuted contract, under which he and his co-tenant previously held, to be spread upon the record, is not sufficient to rebut the presumption of an adverse possession arising from a long-continued, notorious, and peaceable occupancy under the new purchase.³ So where the plaintiff claimed the whole premises, and alleged a wrongful entry and eviction, which allegations were denied by the defendant, and it appeared that a demand had been made and refused, and also that one entitled as heir to part had conveyed the premises by a warranty deed to one who took possession claiming the whole; held, sufficient evidence of ouster.⁴ So, where a married woman, who was a parcener, united with her husband in a deed, and purported to convey the whole estate in fee in lands, and their grantee took possession under the deed, and held for more than twenty years; it was held that an ouster might be presumed, and the other parcener barred.⁵ (a)

¹ *Abercrombie v. Baldwin*, 15 Ala. 363; 8 B. Monr. 177.

² *Russell v. Marks*, 3 Met. (Ky.) 37.

³ *Johnson v. Toulmin*, 18 Ala. 50.
See *Dumont v. Dufore*, 27 Ind. 263.

⁴ *Wright v. Saddler*, 20 N. Y. (6 Smith), 320.

⁵ *Gill v. Fauntleroy*, 8 B. Monr. 177.

(a) With reference to the exercise of tenants in common; if there be two tenants in common of a *folding*, and one by the mere right of possession, as between

§ 5. A third person may sometimes set up the title of one tenant in common, and an authority from him, in justification of what would otherwise be an unlawful interference with the property. Thus a party put in possession of, or allowed to occupy, a portion of premises by one tenant in common, cannot be sued as a trespasser by another, without notice to quit, or other act showing a termination of this license or tenancy.¹ So one cannot eject a person in possession by leave of the other.² So a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and, in this respect, there is no distinction between the co-tenant and one entering with him, and under his authority.³ So one tenant in common has no right to seize to his own use ores mined by a lessee of his co-tenant.⁴ But in some cases a third person cannot avail himself

¹ Ord v. Chester, 18 Cal. 77.

² M'Gavnell v. Murphy, 1 Hilt. 132.

³ 4 Dev. & B. 246.

⁴ Blewett v. Coleman, 40 Penn. 45.

force prevent the other from erecting hurdles, trespass lies. Co. Lit. 200 b.

Where certain hay, belonging to A and B, was deposited in the barn of B, with the consent of A; it was held that A had no right to break and enter the barn, for the purpose of carrying away the hay or any part of it, and that such breaking and entering was a trespass. Crocker v. Carson, 33 Me. 436.

But one tenant in common of a barn-floor has no right to use force and violence to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former then standing on the floor. Commonwealth v. Lakeman, 4 Cush. 597.

The following miscellaneous examples further illustrate the mutual rights and liabilities of parties jointly interested:—

It is held that one claiming a privilege in a well and pump situate in the land of another, each being bound to contribute his proportional part of the repairs, can have no action against the latter for neglect to repair, until after a request and refusal. Doane v. Badger, 12 Mass. 65. See Calvert v. Aldrich, 9 Mass. 74.

The subject of *waste*, as between tenants in common (see *Waste*), is very generally regulated by statute in the United States.

At common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate, although he embezzled the profits or appropriated the whole to himself. Shiels v. Stark, 14 Geo. 429.

One tenant in common could not maintain an action on the case in the nature of waste against another, in possession of the whole, and having a demise of a moiety from the plaintiff, for cutting down trees of proper growth and age for cutting. Otherwise, if unfit to be cut. Martin v. Knowllys, 8 T. R. 145.

It is not a trespass for the owner of land to take away the *fence* separating it from the land of another, for the purpose of rebuilding it with other materials. Burrell v. Burrell, 11 Mass. 294.

In reference to this peculiar subject of ownership as between tenants in common, it is remarked: "Where the subject of the action (trespass) is a *partition fence* between the lands of two adjoining proprietors, it is presumed to be common property of both, unless the contrary is shown. If it is proved to have been originally built upon the land of one of them, it is his; but if it were built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land. If the boundary is a hedge and one ditch, it is presumed to belong to him on whose side the hedge is; it being presumed that he who dug the ditch threw the earth upon his own land, which alone was lawful for him to do, and that the hedge was planted, as is usual, on the top of the bank thus raised. But if there is a ditch on each side of the hedge, or no ditch at all, the hedge is presumed to be the common property of both proprietors." 2 Greenl. Ev. 507.

of a mere wrong or neglect, as between the tenants themselves. Thus where one of several tenants in common, of the right to dig and remove ore from another's land, enters and digs and removes ore therefrom, the owner of the land cannot maintain trespass against him, on the ground that he did not first give notice to his co-tenants, according to the provision of a statute, of his intention to enter, &c.¹

§ 6. In regard to *creditors* of a joint owner or tenant in common, this peculiar form of ownership of course does not exempt property from a liability for debts. (a) It is to be observed, however, in reference to the rights of the party owning in common with a debtor, that, while an officer may lawfully take possession of prop-

¹ Arnold v. Stevens, 1 Met. 266.

(a) Where the interest of one tenant in common has been conveyed to a third person, a creditor of such tenant, who claims the conveyance to be fraudulent and void, has no legal interest in the common estate, until he has appropriated the same, or some portion thereof, to the payment of his debt, or has instituted some proceedings for that purpose. Staples v. Bradley, 23 Conn. 167.

A and B being entitled to a remainder in slave property, expectant on a life-estate, a *fi. fa.* was sued out against A, and levied on some of the slaves then in his possession, by consent of the tenant for life, and the slaves were sold by the sheriff. A then conveyed all his estate to a trustee for the benefit of his creditors. After the death of the tenant for life, in a suit brought by the trustee against A and B for partition, the slaves so sold by the sheriff were allotted to the trustee, the purchaser at the sheriff's sale not being a party to that suit. In an action of detinue, by the executor of the purchaser against the trustee, for such slaves; held, at the time of the levy and sale by the sheriff, the debtor had no several property in any particular slaves, and so no title passed; and the subsequent division, in the suit to which the purchaser was not a party, did not give him a legal title to the slaves so purchased. Leslie v. Briggs, 6 Leigh, 6.

If, pending an attachment of personal property, in a suit against a tenant in common, the co-tenant makes a division of the property, and takes one half, he is liable to the officer in trover, although the officer sells the other half, and applies all the proceeds to the execution. Reed v. Howard, 2 Met. 36.

Substantially the same rules have been applied to *partners* as to tenants in com-

mon. Where a sheriff sells the property of a partnership as the individual property of one partner, he is liable in trover to the other for his undivided share in the property, without regard to the state of the partnership accounts. Walsh v. Adams, 3 Denio, 125.

After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner. Held, that the creditor, by such delivery, became tenant in common of the goods with the assignees, by relation, from the act of bankruptcy; and the assignees could not maintain trover against him. Smith v. Oriell, 1 E. 368.

After an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands. Then the solvent partner died, leaving the defendant his executor; and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs. Held, they were tenants in common with the solvent partner, and, after his decease, with his representatives, by relation from the act of bankruptcy, and could not therefore maintain trover against the defendant claiming under such solvent partner. Smith v. Stokes, 1 E. 363.

The possession of indivisible personal property (a horse) by one tenant in common is that of all. Upon a sale of his interest by a tenant in common out of possession, the possession of the other tenant becomes that of the purchaser. And such possession is sufficient, as against a levy by an execution creditor of the vendor. Brown v. Graham, 24 Ill. 628.

erty owned by tenants in common, by virtue of an execution against one of them, and sell the interest of that one, and deliver the property to the purchaser; he cannot lawfully sell the share of the other tenant in common, but would by that act become a trespasser *ab initio*, at least so far as it respects that share of the property¹ and liable to the other part-owner in trover or trespass, at his election.² But not at the suit of both.³ But if the sheriff sells only the undivided moiety or interest of the debtor, it has been held that the purchaser becomes a tenant in common with the other tenant; who cannot, therefore, maintain trespass or trover against him, the tenancy in common not being destroyed or severed by the sale.⁴ So, A and B being joint owners of carding-machines, A sold his half to C, and B and C agreed to work them together. Afterwards B delivered the machines to a sheriff, who took and sold them on an execution against A. In an action of trover brought by C against B for his half of the machines; held, the sale from A to C did not sever the tenancy in common, and trover would not lie.⁵

§ 7. With regard to *suits brought by parties jointly interested against third persons*, (a) it is held that tenants in common *must*

¹ Waldman v. Broder, 10 Cal. 378; Lothrop v. Arnold, 25 Me. 136; Edgar v. Caldwell, 1 Morris, 434; Renton v. Chaplain, Stockt. 62; Hill v. Wiggin, 11 Fost. 292; 34 Ala. 652.

² Melville v. Brown, 15 Mass. 82; Ladd

v. Hill, 4 Vt. 164; Bradley v. Arnold, 16 Vt. 382.

³ Sheppard v. Shelton, 34 Ala. 652.

⁴ Mersereau v. Norton, 15 Johns. 179; Fiero v. Betts, 2 Barb. 633. But see Waddell v. Cook, 2 Hill, 47 n.

⁵ St. John v. Standing, 2 Johns. 468.

(a) Upon this subject, the following distinctions in reference to different classes of wrongs are laid down by an approved writer on pleading. It will be seen by the cases referred to in the text, that this statement presents a substantially complete and accurate view of joint rights and liabilities, in relation to the forms of proceeding:—For injuries to the person, several persons cannot in general sue jointly, as for slander, battery, or false imprisonment. To this rule, however, there are some exceptions. (See *Slander, Libel, False Imprisonment, Partners.*) 1 Chit. Pl. 54.

In actions for injuries to personal property, joint-tenants and tenants in common must join; but parties having several and distinct interests cannot in general join; as if the goods of A and B, the separate property of each, be unlawfully distrained, they cannot join in replevin. But though the interests be several, yet if the injury

occasion an entire joint damage to several, they may in some cases join. As where two persons were severally seised of two ancient mills, at one or the other of which the defendant ought to have ground his corn, but neglected to grind at either, it was decided that both might join; and where goods are bailed to two, and only one has the possession in fact, and a stranger carries them away, both may have detinue or trespass, or the one who had actual possession may sue alone. 1 Chit. Pl. 54, 55.

In actions for injuries to real property, joint-tenants and parceners must join in real as well as personal actions, or the non-joinder may be pleaded in abatement. Tenants in common must, in general, sever in real actions; but in personal actions, as for a trespass or a nuisance to their land, they may join. A tenant in common, may, however, in general, sue separately. 1 Chit. 55, 56.

join in all personal actions concerning the common property.¹ As in an action for nuisance to land.² Or in a complaint for flowing by a mill-dam.³ So where injury to joint property is alleged in a complaint, and it is averred that one of the joint owners has *assigned* his claim therefor to the other, who brings his action for damages in his own name alone; the complaint is held demurrable.⁴ And in many cases they *may* join, though they might also bring separate actions. Thus a separate possession, by several tenants in common, of the common territory, but without the intention of entirely severing the tenancy, will not prevent their joining in an action for a trespass upon one divided portion.⁵ So where the owner of lands agrees with another, that he may sow the land on shares, it is held that they may maintain a joint action of trespass against a third person who cuts and carries away the corn.⁶

§ 7 *a.* And it may be further remarked, though not strictly pertaining to the subject of joint or common title, that, if two persons have an *entire joint damage*, they *may* bring a joint action, though their interests are several.⁷ It is said, "There seems to be no reason why different plaintiffs who have different rights should not sue the same defendant in respect of separate injuries, though arising out of one transaction."⁸ Thus different persons, owning separate tenements affected by a nuisance, may join in a suit to restrain its continuance by an injunction.⁹ So where A is the owner of a mill, and A and B are jointly interested in the business of the mill; they may join in a suit for the negligent burning of it.¹⁰ So where two persons have entered lands in their individual names, and afterwards make an agreement by deed, reciting that the lands were purchased jointly "for promoting the joint interest of the parties by securing to them the timber on said lands to be sawed into plank;" the instrument will operate as a covenant, on the part of each, to stand seised to the use of the other of an individual interest in the trees growing on the lands, and will authorize the parties to maintain an action of trespass jointly for an injury to the trees.¹¹ But where goods had been bailed by several, upon the terms that the bailee was not to part with the possession, except

¹ Lane v. Dobyns, 11 Mis. 105; De Puy v. Strong, 37 N. Y. 372. See Boobier v. Boobier, 39 Me. 406.

² Low v. Mumford, 14 Johns. 426.

³ Tucker v. Campbell, 36 Me. 346.

⁴ Oliver v. Walsh, 6 Cal. 456. See Moore v. Massini, 32 Cal. 590.

⁵ Johnson v. Goodwin, 1 Williams, 288.

⁶ Foote v. Colvin, 3 Johns. 216. But see You v. Flinn, 34 Ala. 409.

⁷ Coryton v. Lithebye, 2 Saund. 115.

⁸ Per Best, C. J., Knight v. Legh, 4 Bing. 589.

⁹ Peck v. Elder, 3 Sandf. 126.

¹⁰ Cleaveland v. Grand, 42 Vt. 449.

¹¹ Blackburn v. Baker, 1 Ala. 173.

upon the joint order or request of the bailors, and the bailee afterwards delivered possession to one of the bailors upon his sole request; it was held, that the bailors jointly could not maintain an action for the delivering up of the goods, without the joint order or request of the bailors.¹ So where one was to furnish a boat, and another take charge of it, for joint profit, a joint action may be brought for an injury to it.²

§ 7 *b*. An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Thus where an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them; the court ordered the judgment to be arrested.³ Nor can two bring a joint action for false return to a mandamus.⁴

§ 7 *c*. Tenants in common of real estate may maintain some actions relating to the property, separately; — as ejectment,⁵ or trespass to try title.⁶ So one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages.⁷ So, where Maine and Massachusetts jointly made a grant of land, reserving a certain quantity for the support of schools and public worship, and the State of Maine caused the reserved part to be set off by certain prescribed proceedings; it was held, that the State of Maine could maintain trespass against the grantee for cutting timber on such reserved part, although the State of Massachusetts was no party to the process by which it was set off, and did not join in the suit, or interpose any claim.⁸ So where a farm is worked on shares, each co-tenant is entitled to the whole of the crop as against all persons but his co-tenant, and can maintain a suit for its recovery.⁹ So, in an action of trespass *qu. claus.*, for breaking, entering upon, and cutting and carrying away trees from land owned by tenants in common, each tenant is entitled to his several action; and it cannot be defeated by a subsequent payment to his co-tenants for the wood thus taken and carried away.¹⁰

¹ Brandon v. Scott, 40 Eng. L. & Eq. 105.

² White v. Bascom, 2 Wms. 268.

³ Barratt v. Collins, 10 Moo. 446.

⁴ Butler v. Rews, 12 Mod. 349, 371.

⁵ Hammett v. Blount, 1 Swan, 385.

⁶ Croft v. Rains, 10 Tex. 520; Hines v. Trantham, 27 Ala. 359; Grassmeyer v. Beeson, 18 Tex. 753; May v. Slade, 24 Tex. 205. But they must join in actions

relating to the possession merely, as that is joint, though their titles are several. Thus they must join in trespass *quare clausum*. Ibid.

⁷ Dwight v. County, &c., 7 Cush. 533.

⁸ Hammond v. Morrell, 33 Me. 300.

⁹ Knox v. Marshall, 19 Cal. 617.

¹⁰ Longfellow v. Quimby, 29 Me. 196; Jewett v. Whitney, 43 Ib. 242.

Though it is held, that, in an action of trespass *qu. claus.* by one joint owner, he cannot recover more than his proportion of damages.¹ (a)

§ 7 *d.* And under some circumstances, creating a distinct title in one owner, in addition to the joint ownership, one tenant in common of personal property may sue alone for an injury done to it. Thus a part-owner of personal property, having the possession and control of it, with power to sell, may maintain trover against a wrong-doer who converts it.² So although a thing deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, cannot lawfully be demanded by one without the authority of the other, so as to enable him to maintain trover upon the bailee's refusal to deliver it; yet, where it had been agreed between the assignor and the assignee of a lease, that, to save the expense of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account; and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent) procured an illegal and void conveyance of the property in it from the assignee: held, that the assignee, or his legal representatives, might alone maintain trover for it, after demand and refusal.³

§ 8. It is to be further observed, that, even where an action is brought by one person, in which others should properly have been joined as plaintiffs; the objection will be waived, unless taken by *plea in abatement*.⁴ Thus one tenant in common may maintain an action against a stranger for a conversion, and recover his separate

¹ Webber v. Merrill, 34 N. H. 202; Jackson v. Todd, 1 Dutch. 121. Contra, Hibbard v. Foster, 24 Vt. 542.

² Hyde v. Noble, 13 N. H. 494.

³ May v. Harvey, 13 E. 197.

⁴ Nelthorpe v. Dorrington, 2 Lev. 113;

Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 Ib. 279; Heath v. Hubbard, 4 E. 110; Bloxam v. Hubbard, 5 Ib. 407; Wheelwright v. Depeyster, 1 Johns. 471; Scott v. Godwin, 1 B. & P. 67; Chandler v. Spear, 22 Vt. 388.

(a) It has been held that one or more joint tenants of slaves might maintain trover without joining the others. Howard v. Snelling, 28 Geo. 469.

The agent of three tenants in common, of a tract of woodland, wrongfully cut down and sold the timber, and applied the proceeds to his own use. Held, that one of the owners could not waive the tort, and maintain a separate action of assumpsit for a share of the proceeds;

the wrong-doer's legal liability being to all the tenants in common jointly, their action must be a joint one, whether sounding in tort or in contract. If such tenant in common were a married woman, the injury, before the passage of the Pennsylvania act of 1848, gave a right of action to the husband and wife, which survived to the husband at her death. Irwin v. Brown, 35 Penn. 331.

interest, if the non-joinder is not pleaded in abatement.¹ So one of two reversioners may, during the continuance of the particular estate, maintain an action on the case for an injury to the reversion, recovering only a moiety of the damages. Unless the non-joinder of the other reversioner is pleaded in abatement, the only effect of such non-joinder will be to limit the damages.² (a) And even for this purpose it has been held inadmissible.³ The objection in question cannot be taken in arrest of judgment.⁴ So, after verdict and judgment, it is too late to object, that the evidence showed that the plaintiff owned the property jointly with the defendant.⁵

§ 8 a. And another qualification of the rule of joinder is, that where one joint-owner would have no right of action, the other, having such right, may sue alone. Thus if one tenant in common sell the whole property to a stranger, trover lies against the purchaser, in favor of the others, for their share. Such sale is void as to them, and does not make him a tenant in common with them.⁶ (b) So one tenant in common of personal property may sustain trover against an officer, for his undivided moiety, when the officer has sold the whole property upon execution against the co-tenant.⁷ This exception more peculiarly applies, where the circumstances raised a doubt, whether the party defendant in such

¹ Tripp v. Riley, 15 Barb. 333.

² Putney v. Lapham, 10 Cush. 232.

³ Zabriskie v. Smith, 3 Kern. 322.

⁴ Starnes v. Quin, 6 Geo. 84.

⁵ Rank v. Rank, 5 Barr. 211.

⁶ Starnes v. Quin, 6 Geo. 84.

⁷ White v. Morton, 22 Vt. 15.

(a) A joint possession of the *locus in quo*, with others, is a sufficient possession, on the part of the plaintiff, to enable him to maintain trespass *quare clausum*. *Holly v. Brown*, 14 Conn. 255.

Where several plaintiffs join in an action of trespass to try title, a deed, conveying the land in controversy to some of them, is admissible evidence for the grantees therein named; and therefore a motion to exclude it may be refused. *Lindsay v. Hoke*, 21 Ala. 542.

One of several defendants in an execution may replevy property levied on, although his co-defendants do not unite with him in executing the forthcoming bond. *Sheppard v. Melloy*, 12 Ala. 561.

And, in general, the principle stated in the text applies to the action of *replevin*. *Wright v. Bennett*, 3 Barb. 451.

(b) It may be remarked, that, where several parties, as required by law, join in a suit, a defence available against one alone will defeat the action. Thus, in trover, the plaintiffs claimed under a bill

of sale from A, and the defendant, by virtue of a subsequent attachment, as a creditor of A. It appeared that the bill of sale was fraudulent and void as against the defendant, in relation to the interest of one of the plaintiffs. Held, the plaintiffs could not recover, although none but A participated in the fraud, or had any knowledge of it. *Pettibone v. Phelps*, 13 Conn. 445. See *State v. Andrews*, 29 Conn. 100; *McDaniels v. McDaniels*, 40 Vt. 363.

Where a sheriff levies on and sells land as the property of a party, who has in fact no interest in the land, but only lives on it with the real owner; a joint action, of trespass to try titles, will not lie by the purchaser, against the party as whose property the land was sold, and the real owner. The sheriff's deed, being no estoppel as against the real owner, does not, in a joint action, operate as an estoppel against the party, as whose property the land was sold. *Bauskett v. Holsonback*, 2 Rich. Law, 624.

process had any interest in the property. Thus A furnished B with upper leather to be made into boots, under a parol agreement between them that the leather should remain A's until paid for. B made boots, and for a while sent them to New York to be sold by a commission merchant, who made acceptances for B alone, and made remittances to B alone. A parcel of boots, afterwards made by B from upper leather so furnished by A, were attached as B's property, and were subsequently sold as such on execution by the attaching officer. Held, that A was either the owner of the whole property in the boots, or was owner in common with B, and might on either ground maintain an action of trover against the officer for a conversion by the sale on execution.¹

§ 8 *b*. Another qualification of the general rule is, that, although the action should properly be a joint one, yet if, by the pleadings, the defendant raises the issue of a joint title, or title in a third person; the plaintiff will prevail. Thus, in trover, the declaration stated that the plaintiff was possessed as of his own property of four horses, which the defendant converted to his own use. Pleas, first, that they were not the property of the plaintiff; second, that a judgment was recovered against J. F., and that the defendant, an officer, seized them under an execution against J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff. Replication, that they were the property of the plaintiff *modo et formâ*. It was found by the jury, that they were the property of the plaintiff and J. F. jointly. Held, that the issue raised by the defendant was, whether the horses were the sole property of J. F., and, the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover.² But, in trover, where the question was, whether goods were the property of the plaintiff alone, or jointly with J. S.; held, as the plaintiff and J. S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover.³

§ 8 *c*. Another rule, is, that, where one tenant in common sues separately in trover, and the defendant does not plead in abatement, and the plaintiff recovers his proportion of the common property; the other tenants may afterwards sue severally for their interest, and the defendant cannot plead a non-joinder.⁴

¹ Bryant v. Clifford, 13 Met. 138.

³ Nathan v. Buckland, 2 Moore, 153.

² Farrar v. Beswick, 1 Mees. & Wels. 682; 2 Gale, 153.

⁴ Starnes v. Quin, 6 Geo. 84.

§ 9. With regard to *joint liability* for torts, or actions *against joint wrong-doers*; it is the general rule, and a marked distinction between *torts and contracts*, that the plaintiff may sue any of those who committed the tort, and the non-joinder of the others cannot be pleaded in abatement.¹ (a) The rule is applied alike to all classes of torts, and to all forms of action, and may be found expressed in the books in a great variety of terms. Thus it is held, that, where an immediate act is done by the co-operation or the joint act of two or more persons, they are all *trespassers*, and may be sued jointly or severally; and any one of them is liable for the injury done by all, even to the extent of exemplary damages;² provided, however, either that they acted in concert, (b) or that

¹ Low v. Mumford, 14 Johns. 426.

² Hair v. Little, 28 Ala. 236; Miller v.

Sweitzer, 22 Mich. 391; Berry v. Fletcher, 1 Dill. 67.

(a) "They who have authority over him that does the injury, and command the doing it; they who give their consent when the injury could not have been done without such consent; they who assist the principal party in doing it; or they who protect and screen him after it is over; are any of them accessories in a higher degree." 1 Rutherf. Nat. L. 407.

The distinction, however, is taken, that, where the parties committing a tort are joint owners of land, and the tort consists in the omission of some act, which, as such owners, they were bound to perform; as, for instance, for not setting out tithe, &c.; all must be joined in the action, as in such case the title to realty will come in question; that is, whether the defendants, by reason of their ownership, were bound to perform the act, for the omission of which the action is brought. But if the act complained of consists in a malfeasance, as if the defendants had erected a nuisance on their land, no advantage can be taken of the non-joinder, for in such case their title cannot come in question, and they are equally liable whether they have a right in the land or not. Low v. Mumford, 14 Johns. 426; 1 Chit. Pl. 78; 1 Saund. 291.

(b) The plaintiff, in an action of trespass *vi et armis*, in one count, alleging sundry wrongful acts of the defendants on one day, claimed that all the acts complained of took place on that day, in the prosecution of a concerted plan of the defendants to get the plaintiff out of the house. After the plaintiff had given evidence of an assault, by one of the defend-

ants alone, early in the morning, she was proceeding to prove a subsequent assault by the other defendant, when the defendants objected to the latter evidence. Held, the plaintiff, under her declaration, could prove but one assault, and that the one she had elected to prove; but if the acts complained of were parts of a concerted plan of the defendants, as claimed by the plaintiff, the evidence objected to was proper. Brown v. Wheeler, 18 Conn. 199. See State v. Merritt, Phill. (N. C.) 134; Com. v. Hurley, 99 Mass. 433; Murphy v. Wilson, 44 Mis. 313.

The declaration charged a joint assault by the defendants, to which they pleaded jointly not guilty, and informed the court that this was intended to meet the declaration exactly. There was no claim by the plaintiff that one of the defendants could be subjected for an assault by the other, unless they acted in concert. The defendants claimed and requested the court to charge the jury, that, if they should find one defendant guilty and the other not guilty, they should render a verdict accordingly; but the court, in view of the matters actually in controversy, submitted the case to the jury upon the evidence, directing them only, that, if they should find the facts proved, as stated in the declaration, they must return a verdict against the defendants. Held a correct charge. Ibid.

In an action against several defendants for an assault and battery, any of them may be held liable, although they did not touch the plaintiff, provided they aided, encouraged, or abetted the act; and may be principals, though the persons actually engaged in committing the

the act of the party sought to be charged ordinarily and naturally produced the acts of the others.¹ So "all persons, who direct or request another to commit a trespass, are liable as co-trespassers."² All who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, without reference to comparative, individual interest, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands.³ Thus, a person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof, that a person is present at the commission of a trespass without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same.⁴ So several creditors of one debtor, who, without concert, deliver their respective writs to one officer, upon which the debtor is wrongfully imprisoned at the same time; are liable to him as joint trespassers; and consequently a satisfaction by one discharges all.⁵ So where one goes in aid of a person who commits a trespass, though he takes no further part in it, he will himself be guilty of trespass.⁶ And if one sell timber upon land of another, and the purchaser cut and remove it; the seller is a trespasser.⁷ So trespass may be maintained against a person who merely carries away the materials of a building, which has been pulled down by a trespasser.⁸ So in trespass against three for assault and battery; plea, *not guilty*, by all; by a third, a justification in defence of his freehold; replication, that he used more force than was necessary; rejoinder, that all the defendants did not use more force than was necessary; demurrer and joinder; held, the replication was good, and the rejoinder bad.⁹ So the plaintiff, owning a lot in Portland, constructed, at his own expense and from his own materials, a sidewalk in front of the lot, some

¹ Brooks v. Ashburn, 9 Geo. 297; Sutton v. Clarke, 6 Taunt. 29; Smith v. Felt, 50 Barb. 612; Shepherd v. McQuilkin, 2 W. Va. 90; Lewis v. Johns, 34 Cal. 629.

² Per Paige, J., Herring v. Hoppock, 15 N. Y. (1 Smith) 413.

³ Judson v. Cook, 11 Barb. 642; Allred v. Bray, 41 Mis. 484.

⁴ Brown v. Perkins, 1 Allen, 89.

⁵ Stone v. Dickinson, 7 Allen, 26.

⁶ Clark v. Bales, 15 Ark. 452.

⁷ Dreyer v. Ming, 23 Mis. 434.

⁸ Woodruff v. Halsey, 8 Pick. 333.

⁹ Morrow v. Belcher, 4 B. & C. 704.

injury did not know that other persons were consenting or aiding and encouraging the act. Frantz v. Lenhart, 56 Penn. 365.

of which materials the city removed and sold, and the defendant assisted in carrying them away. Held, the defendant was liable to the plaintiff in trespass for the value.¹ So A and B were tenants in common of a tract of land. A, with the assent of B, employed a surveyor to run the boundaries of their land; and, in doing so, A, accompanied by the surveying party, committed a trespass on an adjoining tract. Held, that B was equally liable for such trespass.² So where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball; it was held, that they were all liable in trespass; provided, that, from the width of the road and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was such as to be likely to endanger them, and that the individual by whom the ball was thrown was acting in the usual manner of persons engaged in such game.³ So where the defendant ascended in a balloon, which descended a short distance from the place of its ascent into the plaintiff's garden; and the defendant, being entangled and in a dangerous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, &c.; held, that, though ascending in a balloon was a lawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable in trespass for all the damage done to the plaintiff's garden.⁴ So joint owners of a ram, known by them to have an unusual propensity for butting persons, are jointly liable for damage done by such butting, although it was done while the ram was being kept in a pasture in which he had been placed by one joint owner without the knowledge or consent of the other, and in which pasture the latter had no interest.⁵ So, where one of the defendants sold a steer running at large on the prairie to the other, and agreed to point it out on request, and pointed out by mistake a steer belonging to another man, which the other defendant killed; trespass lies against both jointly; though it would be otherwise, had the steer been pointed out by one a stranger to the bargain.⁶ (a)

¹ *Muzzey v. Davis*, 54 Me. 361.

² *Elliott v. McKay*, 4 Jones, 59.

³ *Vosburgh v. Moak*, 1 Cush. 453.

⁴ *Guille v. Swan*, 19 Johns. 381.

⁵ *Oakes v. Spaulding*, 40 Vt. 347.

⁶ *Hamilton v. Hunt*, 14 Ill. 472.

(a) In case of injury to a coach passenger by collision of the coach, not lighted, with a turnpike gate not safely fastened back; if both causes contrib-

§ 9 *a*. The same principle is applied to the wrong of *conversion* and the action of *trover*. Thus a party not personally engaged in the acts of taking, using, and disposing of the property, but who co-operated with the principal actor, by aiding and abetting him in doing these acts, and subsequently recognized and approved of them; or one who advised and assisted in the measures taken to obtain possession, and for whose benefit the acts were in part done, and who subsequently approved of and adopted them; is chargeable with the conversion.¹ If goods are wrongfully taken by one party, the defendant, who has since come into possession of them, is deemed a wrong-doer as much as the original tortious taker, unless he establish his possession in good faith and for a lawful purpose.² And, in order to constitute a joint conversion of personal property, the acts of the several defendants need not be *contemporaneous*, if their acts and purposes all tend to the same result.³ Nor need the party have had the exclusive control or actual *manucaption* of the goods; but the term embraces in its legal import any intermeddling with or dominion over the property of another, subversive of the rights of the true owner. Thus, if the defendants were actually present, aiding another in the unlawful design of removing the plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it were for the use and benefit of his wife; each act in furtherance of the common design was the act of all, and all are guilty.⁴ So, in *trover* for sheep, it was held a correct instruction, that, if the defendant was aware of the wrong of a third person, and undertook to aid him to secrete the sheep and keep them from the true owner; or if the defendant had been indemnified, before the suit was commenced, for withholding the sheep from the true owner, and preventing her from enjoying her property; or confederated with other parties for that purpose, and did withhold the sheep: then the jury should find the fact of conversion by the defendant.⁵ So where two persons are in the joint possession of personal property owned by a third, demand of one of them will be sufficient to sustain *trover* against both.⁶ So where the managing partner, conducting the business of the defendants, a mining con-

¹ 19 Conn. 319; *Miller v. Thompson*, 60 Me. 322.

² *Tallman v. Turck*, 26 Barb. 167. See *Garrard v. Pittsburgh, &c.*, 29 Penn. 154.

³ *Cram v. Thissell*, 35 Me. 86.

⁴ *Freeman v. Scurlock*, 27 Ala. 407.

⁵ *Scott v. Perkins*, 28 Me. 22.

⁶ *Ball v. Larkin*, 3 E. D. Smith, 555.

uted to the injury, he may recover of Danville, &c. v. Stewart, 2 Met. (Ky.) the driver and the turnpike company. 119.

cern, refused to deliver up ore belonging to former tenants of the mine, on the ground that it belonged to the firm, and there was a subsequent offer from the attorney of the defendants to deliver up tools that were in the same building with the ore; held, trover would lie.¹ (a) So where a consignee, with power to sell, sells with intent to defraud the consignor, which intent is known to the purchaser; the seller and buyer are jointly liable in trover.² So, A's horse having been stolen, B shortly afterwards bought it *bonâ fide* at a repository for the sale of horses, and then sent it for sale to another repository kept by C. A, having demanded the horse of C, was referred by him to B as the owner. B, when applied to, refused to give it up, and A again demanded the horse in the presence of B and C, offering them an indemnity, when they both refused to deliver it up. Held, that such refusal was evidence of a conversion, by both B and C.³ So the plaintiff in a prior suit, the officer, and some bidders, went to the house of the defendant in that suit, and sold her "right, title, and interest" in personal property, and the purchaser removed the goods; and the plaintiff and officer clearly intended to take and sell the property. Held, that all were jointly liable for the conversion to one holding a duly recorded mortgage of the goods.⁴

§ 9 b. The same rule of joint liability is applied in case of *fraud*. Thus where two receivers are appointed to close up the concerns of a corporation, and one of them illegally appropriates the funds, and the other negligently permits it; they will be jointly liable for the balance found due from them, upon stating their account, with interest.⁵

§ 9 c. The question of joint liability is *for the jury*. Thus, in trespass against two, it is properly left to the jury to decide, whether there was a joint trespass, or only one, if any, guilty.⁶ And where, in an action of trespass against two, there is any evidence from which the jury might reasonably infer the participation of one of them, it is no error to refuse to charge the jury, that they ought to find him not guilty.⁷ (b) So in an action on the

¹ Lloyd v. Bellis, 37 Eng. L. & Eq. 545.

² White v. Wall, 40 Me. 574.

³ Lee v. Robinson, 37 Eng. L. & Eq. 406; Lee v. Bayes, 18 Com. B. 599.

⁴ Underhill v. Reinor, 2 Hilt. 319.

⁵ Com. v. Eagle, 14 Allen, 344.

⁶ Owens v. Derby, 2 Scam. 26.

⁷ Jones v. Welch, 15 Ala. 306.

(a) Trover will lie against different individuals for successive conversions of the same property. But the plaintiff can receive but one satisfaction. A satisfied judgment, therefore, is a bar to an action

for the conversion of the same property. Matthews v. Menedger, 2 McLean, 145.

(b) In New York, the following somewhat peculiar and local rules have been settled in relation to the action of *replevin*,

case, for conspiring to prevent the plaintiff, who was about to perform as an actor at a theatre, from acquiring fame and profit by that performance, and for hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance, and for hooting, hissing, &c., together with such persons; it was proved, that, on an occasion when the plaintiff appeared as an actor, there was a great disturbance in the theatre, consisting of hooting, &c., in which the defendants took a prominent part. The plaintiff rested his case entirely on the conspiracy. The Judge left it to the jury to say, whether what took place was the result of a preconcerted arrangement between the defendants and persons in other parts of the theatre. Held, inasmuch as the act of hissing in a public theatre is *primâ facie* a lawful act, though, if done maliciously, it might be actionable, a proper direction.¹ So the plaintiff, while riding in the cars of corporation A, was injured by a collision between their cars and those of corporation B. The plaintiff brought his action against the two corporations. The finding of the jury was, that the accident was caused by the negligence of both. Held, the joinder was proper.² So in an action for assault and battery against two, where although both had threatened the assault only one was present at the moment when the blow was struck; it was proper to submit to the jury whether both were participants.³

§ 10. But, as already suggested, although an act done by the co-operation of several persons makes them all trespassers, and all may be sued jointly, or one is liable for the injury done by all; yet it must appear that they acted in concert, or that the act of the one sued naturally and ordinarily produced the acts of the

¹ *Gregory v. Duke of Brunswick*, 6 M. & G. 953; per Coltman, J., 958.

² *Colegrove v. New York, &c.*, 6 Duer, 382.

³ *Wakefield v. Fairman*, 41 Vt. 339.

brought against several defendants. To recover possession of personal property, where a taking by one is clearly proved, it is not a ground for a nonsuit generally as to all the defendants, that no joint taking by them was proved. But if nothing appears, either in the pleading or in the evidence, to charge a portion of the defendants, they will be entitled to a nonsuit, and the plaintiff may proceed and try the issues between him and the other defendants. And the court may adjudge a return in favor of a part of the defendants, and refuse it as to the others. Although the jury find the exclusive possession to be in one of the defendants,

they are not bound to render a general verdict in favor of all. Where, in an action to recover possession of personal property, a portion of the defendants claim the entire possession, by virtue of a chattel mortgage, in hostility both to their co-defendant, the sheriff, and the plaintiffs, and the proof shows that the sheriff levied upon the property, and held it in subserviency to the mortgage; it is not necessary that the verdict should determine the value of the property admitted by the mortgagees to be in their possession. A general assessment of the whole value is all that is necessary. *Woodburn v. Chamberlin*, 17 Barb. 446.

others.¹ Where two parties act, each for himself, in producing a result injurious to the plaintiff, they are not jointly liable.² (a) Thus a person, to be liable as a joint trespasser, in an assault and battery, where he was not present, must be proved to have done something which led directly to the commission of the offence by another.³ So one who is present at the commission of an assault and battery, without in any way encouraging or discouraging it, is not liable. Nor is it material, that the defendant is a selectman of the town, and participated in a public meeting held a short time before, at which a committee was appointed to visit those suspected of being disloyal, in pursuance of which the plaintiff was visited by the committee, followed by a large crowd of persons, by some of whom he was assaulted in the presence of the defendant; if it appears that at the meeting no violence was suggested or contemplated.⁴ So, if a joint action of trespass be brought against several, the plaintiff cannot declare for an assault by one, and the taking away of goods by the others; these trespasses being of several natures.⁵ So the defendant, with a party of others, used threatening and violent language towards the plaintiff, who shortly after left the State, and, while absent, his house and adjoining buildings were destroyed. Held, in an action for assault and battery, it was error to admit proof as to such absence and destruction, unless it appeared as part of the original trespass, and one transaction, and the defendant was present aiding and abetting in the destruction.⁶ So although, under a declaration in trespass that the defendants on a certain day, and on divers other days and times, between that day and another day specified, broke and

¹ *Guille v. Swan*, 19 Johns. 381.

² *Bard v. Yohn*, 26 Penn. 482; 57 Penn. 142.

³ *Bird v. Lynn*, 10 B. Monr. 422; *Cabbell v. State*, 46 Ala. 195.

⁴ *Miller v. Shaw*, 4 Allen, 500.

⁵ 2 Saund. 117 *a*.

⁶ *Williams v. Gaines*, 3 Cold. 240.

(a) This principle has been recognized in a very recent case in Massachusetts, where a joint action was brought against a physician who prescribed, and an apothecary who put up, a noxious medicine.

More especially a person is not properly made defendant, for a cause of action in which he has no interest, and as to which no relief is sought against him. Therefore, where the complaint alleged that one of the defendants wrongfully pledged certain securities, deposited with him by the plaintiff, to ten other defendants, stating the different contracts under which the securities were transferred to

each of the defendants, separately; it was held, that the ten last-named defendants were misjoined. *Lexington, &c. v. Goodman*, 25 Barb. 469.

A distinction has been made, in regard to joint liability, between an action for damages, and one for the property itself. Thus, where the defendants took from the plaintiff at the same time several negroes, each claiming and keeping possession of a distinct portion of them as his own; the plaintiff could not maintain a joint action of detinue against them, though it seems he might have a joint action of trespass. *Slade v. Washburn*, 2 Ired. 414.

entered the plaintiff's barn, and took and carried away his hay, the plaintiff may recover for as many distinct acts of trespass as he can prove were committed by the defendants between the days mentioned; yet, if he proves several distinct acts of trespass, in some of which a part only of the defendants were concerned, he can only recover against all the defendants for those acts in which all participated.¹ So a hirer of a slave, and one who intermeddled with the slave and put him in jeopardy so that he was fatally injured, were not jointly liable to the owner.² So where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more. And, in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage.³ So where several are engaged in the accomplishment of a lawful object, as in assisting one of them to abate a nuisance on his land: and one or more only commit a trespass in accomplishing this end; the others are not liable therefor.⁴ So where property acquired by a trespasser comes into the possession of another, who sells it, he is not liable in trespass, unless he knew that it was wrongfully obtained, or unless it was obtained for his use by his servant, or unless he assented to the trespass. But he is liable in detinue or trover.⁵ And a person who knowingly receives from another a chattel, which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.⁶ So where A took and converted the mule of the plaintiff, and sold it to B; and the plaintiff brought replevin in the detinet against B, and recovered, and then sued A for the trespass, to which A pleaded the former recovery; held, on demurrer, that the plea was not good, the original taking by A, and the detention by B, being separate causes of action.⁷ So where A allows B to use his horse and wagon and barn, for getting in and threshing grain, the title to which is in dispute between B and C; this does not implicate A as a trespasser.⁸ (a)

¹ Myrick v. Downer, 18 Vt. 360. See Olzen v. Schierenberg, 3 Daly, 100.

² Hawkins v. Phythian, 8 B. Monr. 515.

³ Partenheimer v. Van Order, 20 Barb. 479.

⁴ Richardson v. Emerson, 3 Wis. 319.

⁵ Justice v. Mendell, 14 B. Monr. 12.

⁶ Wilson v. Barker, 4 B. & Ad. 614.

⁷ McGee v. Overby, 7 Eng. 164.

⁸ Heitzman v. Divil, 11 Penn. 264.

(a) A placed a carriage upon one side of a street, and B, without concert with A, a team of horses on the other. The plaintiff, in passing, was kicked by one of

§ 10 *a*. The same rule applies to *conversion* and *trover*. Thus one, who, knowing that property is under attachment, suffers it to be sent away and sold by the owner, and receives the proceeds by virtue of a previous arrangement, is not guilty of a conversion.¹ So, in *trover* against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all. Therefore, where the plaintiff brought *trover* for goods against A and B, bankrupts, and C and D, their assignees, and proved that the bankrupts, before the bankruptcy, received, and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand; and the jury found all the defendants guilty, there being only one count in the declaration: held, the evidence did not warrant such finding.² So where the defendant, a chemist, was in the habit of filling a soda fountain for A, who rented it with another fountain from the plaintiff, and A absconded, leaving the fountain in the possession of the defendant; this is not a tortious conversion by the defendant.³ So where the bailee of a horse sold it, as his own, to an infant, and, the owner demanding the horse of the vendee, his father advised him to retain it till he had made further inquiry; it was held, that the father was not liable,

¹ *Polley v. Lenox, &c.*, Am. Law Reg., Feb. 1862, p. 247 (Mass.).

² *Nicoll v. Glennie*, 1 M. & S. 588.

³ *Parkerson v. Simons*, 2 M'Mullan, 188.

the horses, thrown against the carriage, and by both these causes injured. Held, he could not maintain an action against A and B jointly. *Bard v. Yohn*, 25 Penn. 482.

In an action for throwing coal dirt into a stream above, whereby deposits accumulated in the plaintiff's dam to the injury of his water-power; it was error to charge, that, if the defendants knew that other collieries were throwing coal dirt into the river, the defendants were liable for the combined results of all the deposits. *Little v. Richards*, 57 Penn. 142.

In another case, apparently founded upon the same facts, *Agnew, J.*, says: "The fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream: this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the

defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions. True it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others, without concert." *Railroad v. Gries*, (Pa.) Leg. Intell., July 10, 1868.

as one who had advised or given countenance to the continuation of the unlawful detention.¹ So, to maintain trover against two bailees, it is held that a demand of and refusal by one is not sufficient; a conversion by both must be shown. Though it is otherwise in the case of *partners*, each being the general agent of the other.²

§ 10 *b*. The liability of several persons for the act of one has been qualified by the consideration, that their participation was through mere *mistake*. Thus, where two buy land, A to own the land, B to have the timber upon it; and B, mistaking his bounds, cuts down timber on an adjoining lot; A is not liable in trespass, unless he either induced it or was benefited by it.³ So a *contract* between joint defendants may sometimes be shown, to disprove their joint liability. Thus, in trover against two defendants, for a horse hired of the plaintiff to go to a certain place, it is competent for the defendants to prove, that, by a contract between them, one was to carry the other to such place as a passenger; there being no direct evidence of any express hiring by the latter.⁴ And a party, though jointly liable, may sometimes be held liable only for a portion of the property wrongfully taken. Thus, where one tortiously cuts and carries away trees from another's land, and sells a part of them to one who has no knowledge of the tort; the owner of the trees, even if he can maintain an action against them jointly, can recover of the purchaser only the value of the part of the trees purchased by him.⁵

§ 10 *c*. As has been already stated, the question of co-operation or joint participation in the wrongful act is *for the jury*. Thus in an action of assault and battery, brought by A, against B, and C who was B's bookkeeper and relative, it appeared that A came to the house of B, to settle certain debts, and for which the latter agreed to take one-fourth as a composition. A, B, and C were in B's office, engaged in this arrangement for some time, when B was called to his shop, adjoining the office, to a customer, and soon after, an altercation having arisen between A and C, C committed the assault complained of, which lasted twenty minutes. It appeared, that there was no cause of quarrel immediately between A and C; that the dispute arose altogether out of the settlement; that the shop was only separated from the office by a glass door, which was partly open, and from which C called for a rope to

¹ *Sarting v. Saling*, 21 Mis. 387.

² 4 Hill, 13.

³ *Langdon v. Bruce*, 1 Will. 657.

⁴ *Adams v. Graves*, 18 Pick. 355.

⁵ *Moody v. Whitney*, 34 Me. 563.

hang the plaintiff, which was thrown to him by a person in the shop; and there was great reason to infer that B could hear, if not see, nearly all that occurred in the office. The judge charged the jury, that, if B ordered the assault, or encouraged it, or expressed approbation of it, or gave countenance to it, or did any thing to adopt it as his own, they should find a verdict against him; but added, he should be surprised if they found against B. The jury found for B. On motion to set this verdict aside, for misdirection, and as against law and evidence; held, the question for the jury was left correctly to them in the preliminary part of the charge; and, although the court disapproved of the succeeding strong expression of opinion, that it did not amount to a misdirection, or afford ground for setting the verdict aside. Also, that the verdict was not against the weight of evidence.¹ So the question, whether a *joint conversion* is proved, is for the jury. Thus, W. and R. having hired of M. a number of cows for a year, W. took possession of and kept them on his farm, several miles distant from R.'s residence. A few months after the hiring, the cows were sold under an execution against W., issued upon a void judgment of a justice. At the expiration of the year, the cows being still in W.'s possession, M. demanded them of him, and he refused to deliver them up. A like demand was made of R. at his residence, who said "he would have nothing to do with the matter," and refused to go and see W. on the subject. Held, in trover against W. and R., that whether enough had been shown to prove a conversion by R. was a question for the jury, and the judge could not properly order them to find a conversion by both; that, if R's refusal to act proceeded from an honest desire to avoid the litigation which he supposed might arise from the sale, he was not guilty of a conversion. Otherwise, if his refusal proceeded from a design to aid or countenance W. in unlawfully withholding the cows, or to embarrass the latter in his endeavor to obtain possession.²

§ 11. Upon the grounds above stated, where, in an action of trespass against several defendants, who jointly plead not guilty, a joint trespass is proved, the plaintiff cannot give in evidence, in aggravation of damages, the distinct and unconnected acts of some of the defendants.³ So where the plaintiff, in an action of trover against B and C, introduced evidence proving a conversion by B

¹ Treaper v. Campbell, 3 Irish L. R. 387.

² Mitchell v. Williams, 4 Hill, 18.

³ Higby v. Williams, 16 Johns. 215.

only, without the participation or knowledge of C; it was held, that it was not then competent to the plaintiff to prove a distinct conversion by C.¹ So, in trespass against several defendants, if a joint trespass is proved against part of the defendants only, evidence cannot afterwards be given of another trespass by all, even against such part alone.²

§ 12. The principle of joint liability has often been applied in reference to *officers*, acting in the execution of process. (See p. 155.) When the original act of an officer, in the execution of civil process, is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command. As where a sheriff arrested a debtor on execution, by breaking open the outer door of his dwelling-house.³ So the removal and the retention of the personal property of a stranger, by an officer acting by direction of the party, is a conversion by both, aside from any demand and refusal.⁴ And where the goods of one person are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass.⁵ So if a sheriff has wrongfully attached property, and, while the property is in his possession, wrongfully attaches it by virtue of a second writ of attachment, by direction of the creditor in such second suit; the owner of the property may maintain trespass against the officer and the second attaching creditor jointly.⁶ And where two creditors sue out separate writs of attachment against the same debtor, and put them into the hands of the same officer, who serves them at the same time, by attaching upon them the same property; they are *primâ facie* jointly concerned in the taking of the property, and must be so holden, in an action of trespass brought against them and the officer for such taking. But they must be not merely together at the time of the levy, but in concert of action and co-operation. And it is competent for either of the defendants to show that he had no concern in the taking, or that the taking on the two writs was at different times.⁷ So where the president of a bank, at whose suit an attachment had been issued, and levied on the property of the defendant, when applied to by the constable in

¹ Forbes v. Marsh, 15 Conn. 384.

² Prichard v. Campbell, 5 Ind. 494.

³ Hooker v. Smith, 19 Vt. 151.

⁴ Calkins v. Lockwood, 17 Conn. 154.

⁵ Perrin v. Claffin, 11 Mis. 13.

⁶ Cox v. Hall, 18 Vt. 191.

⁷ Ellis v. Howard, 17 Ib. 380; Eddy v. Howard, 23 Iowa, 175.

regard to selling the property, told him to do his duty; and directed the attorney of the bank to examine the question, and the facts, in relation to a prior lien upon the goods, and to act upon his judgment; whereupon the attorney instructed the constable to sell the goods; and the president of the bank attended the sale and bid off part of the property: held, that this was sufficient to connect the president with the taking or detaining of the goods, and that he was liable in an action therefor.¹ And in an action of trespass against an officer and the plaintiff in an execution, for illegally selling property under it, it is not error to instruct the jury, that they may look to the facts, that the latter was the plaintiff in the execution, and that he had just before the sale delivered to the officer a blank paper, with his signature thereon, as circumstances, in connection with the other proof, tending to show that the sale was made under his directions.² So a bond of indemnity against a levy on particular property, not belonging to the execution debtor, makes the obligor a trespasser, and liable for the full value of the goods, not merely the amount realized on the sheriff's sale.³ More especially where property taken on execution is claimed, if the constable take a bond of indemnity from the plaintiff, and sell the property, which bond is void, they are joint trespassers.⁴ And even the sureties in a bond of indemnity, given to a sheriff, to procure the sale under execution of property belonging to a party other than the defendant in the execution, are held liable as trespassers.⁵ So the plaintiffs in an attachment suit, having indemnified the sheriff, and directed him to take, remove, and sell all the goods of a firm, whereof only a part of the members were defendants; are co-trespassers with the sheriff.⁶ So the principal and surety in an indemnity bond are liable, though the property was sold after satisfaction of the execution by a sale of other articles.⁷ So persons concerned only as appraisers in making a wrongful replevin are trespassers.⁸ And, upon the same principle, if one of two judgment debtors, who knows that the judgment has been paid, procure a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods; he is liable in trespass.⁹ So a justice of the peace, who issues an execution against the body of a debtor, and an attorney, who procures such execution to be issued, and causes

¹ Judson v. Cook, 11 Barb. 642.

² Jones v. Welch, 15 Ala. 306.

³ Pozzoni v. Henderson, 2 E. D. Smith, 146.

⁴ Murray v. Ezell, 3 Ala. 148.

⁵ Wetzell v. Waters, 18 Mis. 396; Her-

ring v. Hoppock, 15 N. Y. (1 Smith) 413.

⁶ Berry v. Kelly, 4 Rob. 106.

⁷ Herring v. Hoppock, 1 Smith, 409.

⁸ Leonard v. Stacy, 6 Mod. 69.

⁹ Glover v. Horton, 7 Blackf. 295.

the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest, or the issuing of such an execution; are jointly liable to the debtor in trespass.¹ So, in Indiana, a justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute, and the party who procures such writ to be issued without first filing the bond, are trespassers, and as such liable to the party injured.²

§ 13. The party to a wrongful process may be sued without the officer. Thus trover lies against one who takes in execution a bankrupt's goods, without joining the officer.³ So a third person, aiding an officer, is thus liable. Thus one who officiously accompanied a sheriff, to aid in executing a *fi. fa.* unnecessarily, at a late hour of the night, and who, against the will of the party rightfully in possession of the property, entered his house without the command of the officer, aroused, alarmed, and insulted his family, and forcibly took the property therefrom; was held to be a trespasser, without justification or excuse.⁴

§ 14. Persons summoned by an officer to assist in the execution of legal process are justifiable in their acts, at least to the same extent that the officer would be.⁵ Thus a person, acting in aid of an officer in making an arrest, is justified in using such force as may be necessary to overcome resistance; if he uses more, he becomes a trespasser, and must, if led astray, in the opinion of the jury, by his own judgment, be responsible for the consequences.⁶ And on the other hand, where one has property upon the premises of another, he may enter peaceably and take it, although he enter with an officer who has a writ of replevin which is not returned.⁷

§ 15. The rule, that joint defendants must have participated in the same act, is applicable to the case of officers. Thus A sued out an attachment against B, and the sheriff was directed to levy it on one-half of a boat and cargo belonging jointly to B and C. A's son was present at the levy, and the sheriff took the whole boat and cargo, and forbade C's interfering with them. Held, in an action of trespass against the sheriff and A jointly, that the attachment was a justification of the taking of all B's interest; and that A and the sheriff should not be jointly convicted, for A

¹ Sullivan v. Jones, 2 Gray, 570.

² Barkeloo v. Randall, 4 Blackf. 476.

³ Rush v. Baker, 2 Stra. 996.

⁴ McElhenny v. Wylie, 3 Strobb. 284.

⁵ Payne v. Green, 10 S. & M. 507.

⁶ Murdock v. Ripley, 35 Me. 472.

⁷ Allen v. Feland, 10 B. Monr. 306.

was not liable for the sheriff's acts in seizing property upon which no levy was directed, and the sheriff was not liable for A's trespass in suing out the attachment, or directing a levy on B's property.¹

§ 16. In this connection we may properly speak of *conspiracy*; a wrong which, from its very nature, can be committed only by more persons than one, and, by reason of the aggravation, and tendency to mischief, attaching to this peculiarity, is ordinarily made the subject of *indictment*, though it may also be the ground of civil action.²

§ 17. It is held that a conspiracy is not actionable, unless the act would be actionable if done by a single person.³ And a mere conspiracy is not actionable, unless it affect some *legal right* of the party who brings the action. Thus the defendants, after a will had been made and executed, devising real estate to the plaintiff, conspired with each other, to induce the testator to revoke it, and effected their object by means of false and fraudulent representations. Held, the plaintiff could not maintain an action, as the revocation of the will merely deprived him of an expected *gratuity*, without interfering with any of his rights.⁴ So where the declaration charges an unlawful confederacy, to abstract money and other valuables, and apply them to the use of the defendant and another without the plaintiff's knowledge; it is necessary to prove the combination and appropriation, and also that it was illegal, and injurious to the plaintiff.⁵ So, in order to sustain an action by a teacher against school directors for maliciously conspiring to remove her from her place; it is necessary to prove malice, an intent to injure, and an unlawful conspiracy. Without such proof, the plaintiff is properly nonsuited. Mere negative evidence of want of probable cause, by showing general good conduct and capacity as a teacher, is not sufficient proof of malice, either in the directors or the committee exercising the powers committed to them by the board.⁶ But a declaration in an action against two, for maliciously conspiring to injure the plaintiff, as, for example, to have him indicted for

¹ Clay v. Sandefer, 12 B. Monr. 334.

² See Morris v. Barclay, 68 Penn. 173; Twitchell v. Com., 9 Barr, 211; State v. Burnham, 15 N. H. 396; Herron v. Hughes, 25 Cal. 559; Tarns v. Lewis, 42 Penn. 402; Com. v. Prius, 9 Gray, 127; Elkin v. The People, 28 N. Y. (1 Tiffa.) 177; Clawson v. The State,

14 Ohio, 234; State v. Mayberry, 48 Me. 218.

³ Kimball v. Harman, 34 Md. 407.

⁴ Hutchins v. Hutchins, 7 Hill, 104; Kimball v. Harman, 11 Law Reg. 54; 34 Md. 407.

⁵ Kirkpatrick v. Lex, 49 Penn. 122.

⁶ Burton v. Fulton, 48 Penn. 151.

perjury ; need not set out any agreement to do any act in itself unlawful, or any act lawful in itself, by unlawful means.¹ (a)

§ 18. An action for a conspiracy has been held to lie in favor of a creditor, against his debtor, and a third person, who have procured the property of the debtor to be attached upon a suit on a fictitious debt, and applied to the payment of the judgment obtained in the action, in order to prevent creditors from obtaining payment out of the property ; the creditor having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment, and the debtor being insolvent. Thus C. and G., partners, being in failing circumstances, G. made a note in the name of the partnership, for \$1500, to P., it being agreed between G. and P. that the stock of C. and G. should be attached on the note, and the proceeds of the attachment applied ratably to the payment of the debts of G. and of C. and G. The attachment was accordingly made, and A. & Co., creditors of C. and G., subsequently, on the same day, attached the same stock in a suit for their debt. The object of the suit of P. was explained, at a meeting of some of the creditors of G., and of C. and G., on the same day, one of the firm of A. & Co. being present. P. afterwards obtained judgment on the note, and seasonably levied his execution on the attached property, which was not sufficient to satisfy the judgment, and distributed a part of the proceeds ratably among creditors of G. and of C. and G., and tendered A. & Co. a like percentage of their debt, which they refused to take. A. & Co. afterwards obtained judgment in their action, and took out execution, and delivered it to the officer who made the attachment, but not until thirty days from the time when their judgment was obtained. The officer returned it unsatisfied. In an action, brought by A. & Co. against G. and P., for a conspiracy to prevent A. & Co. from obtaining payment of their debt out of the property of C. and G., who still remained insolvent ; it was held, that the action lay, without proof of any moral fraud on the part of G. and P. ; that the proceedings, in the suit on the note by P. against C. and G., were a fraud on all creditors of C. and G., who did not assent to them ; that the action was not defeated, by A. & Co.'s not delivering their execution to the officer within thirty days, as he had nothing in his hands on which to levy ; and

¹ *Parker v. Huntington*, 2 Gray, 124.

(a) The declaration need not state the facts and circumstances. *Yuguanzo v. Solomon*, 3 Daly, 153.

that A. & Co. might maintain this action, whether the debt to them from C. and G. was payable or not at the time of their bringing the action against C. and G., on which the attachment was made.¹

§ 18 *a*. But it has been also held, that a creditor whose debt is not due cannot maintain a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently, so as to hinder and defeat creditors in the collection of their lawful demands.² So an action on the case for fraud, by combining with the plaintiff's debtor, in attaching all the personal property of the debtor for the benefit of the debtor, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, charge the defendant as trustee, seek aid in a court of equity, or pursue the defendant personally under the statute, for being a party to a fraudulent judgment or fraudulent sale.³ But where a New York merchant purchased goods from a dealer in Providence, to the amount of \$6000, upon credit, and assigned them without consideration, by a clear bill of sale, and the assignee removed them to Providence, where they would be free from attachment, and sold them there, saying that he intended, with the proceeds of sale, to pay the creditors of the merchant in New York, whose claim he had guaranteed, but refusing to give a list of the creditors, and the merchant also refused to show his books or make any exhibit of his affairs: held, the merchant and his assignee were not liable in an action of conspiracy, if the goods were taken to Providence with a *bonâ fide* intent to sell them for the benefit of creditors; but, if their intent was to secrete them, or to compel the Providence creditors to a compromise upon their own terms without making an exhibit of the affairs of the debtor, they were guilty of a conspiracy.⁴

§ 18 *b*. Where two or more have entered into a conspiracy to defraud the plaintiff, any act done by either, in furtherance of the common object, and in accordance with the general plan, becomes the act of all, and each conspirator is responsible for such act. Thus where one has combined and conspired with others to cheat and defraud the plaintiff in the sale of certain property, by fraudu-

¹ Adams v. Paige, 7 Pick. 542.

² Adler v. Fenton, 24 How. 407. See Lamb v. Stone, 11 Pick. 527; Moody v. Burton, 27 Me. 427.

³ Hall v. Eaton, 25 Vt. 458.

⁴ Whitman v. Spencer, 2 R. I. 124.

lent concealments and misrepresentations, and the fraud has been perpetrated accordingly by some other member or members of the conspiracy; he will be liable, although he may not individually have made any fraudulent misrepresentations, or have fraudulently concealed any thing in regard to the conditions or qualities of the property.¹

§ 19. The general principle applies in case of alleged conspiracy, as of other joint wrongs, that there must be proof of participation *in the same wrongful acts*. (a) This of course involves, primarily, proof of the conspiracy itself. Thus in an action on the case, against A and B, it was alleged that A was indebted to the plaintiff; that the two confederated and conspired together, to prevent the plaintiff from obtaining security for or payment of his debt; that, in pursuance of such purpose and intention, and in order to enable A to take the poor debtor's oath, the defendants caused his property to be removed from his own custody and possession into the possession of B, by whom the same or the proceeds thereof were kept secreted from attachment; that the plaintiff sued out a writ against A to recover the debt, and caused his body to be arrested; that he took the poor debtor's oath and was discharged from arrest; and that the plaintiff entered the suit and recovered a judgment, which remained wholly unpaid. The plaintiff gave evidence of every thing alleged, except the conspiracy, of which there was no direct proof. Held, the action could not be maintained.² So in an action charging a conspiracy to obtain a favorable compromise of suits about to be commenced, it is not sufficient merely to show that there were no grounds to warrant the suits. It ought, in addition, to be proved, that the intention of the parties was unfairly directed to the attainment of such an end by understanding and agreement between them, shown either by their words or acts.³ Upon the same principle, proof that a magistrate, a prosecutor, and a constable, each behaved improperly, will not support a charge of conspiracy in instituting and conducting a malicious prosecution.⁴ So where the plaintiff charged a conspiracy to cheat and defraud him, whereby the defendants fraudulently obtained from him a conveyance of a certain tract of land to one of them; and prayed that the conveyance might be

¹ Page v. Parker, 43 N. H. 363.

² Wellington v. Small, 3 Cush. 145.

³ Leavitt v. Gushee, 5 Cal. 152.

⁴ Newall v. Jenkins, 26 Penn. 159.

(a) It is an indictable conspiracy, when persons join to execute an unlawful purpose, although assembled for a different one. Lomery v. State, 30 Tex. 402.

cancelled, and the title to the land be adjudged to him; it was held, that a mere participation in the fraud, practised by the defendant to whom the conveyance was made, was not, of itself, sufficient to render the other defendants liable to be joined in the action, and that the petition showed no cause of action as to them.¹ But an action for deceit in a sale may be maintained against two persons jointly, if they both knowingly make false representations at the time of the sale, though they had not previously conspired or agreed to make such representations, and though only one of them was interested in the expected fruits of the fraud.²

§ 19 *a*. With regard to the *pleading* and *evidence* in the action for conspiracy; in an action on the case for a conspiracy to defame, by spreading false statements that the plaintiff had cheated and defrauded a third person (the words not being actionable), and also by composing a libellous written statement to the same effect; the declaration need not aver special damage.³ Nor, in a count for a conspiracy to defame, by reporting and charging the plaintiff to have been guilty of a crime, is it necessary to aver that the reports and charges were made falsely and maliciously, nor to set forth the words spoken.⁴

§ 19 *b*. To prove a conspiracy to commit a particular fraud, a like fraud, committed by the alleged conspirators about the same time on a third party, is held admissible in evidence.⁵ So where a conspiracy to defraud the creditors of an obligor, between the obligor and a third person, the obligee, is alleged, the whole transaction may properly be left to the jury, to connect the obligee with the original scheme; and such evidence, in connection with the acts of the obligee, is sufficient to shift the burden of proof upon the latter. And when such a conspiracy has been proved, it may be shown that the obligee engaged in it subsequently, without proof of express declarations or flagrant acts of participation. If it appears that the obligee was to be a principal actor in the execution of the plot, and he performs the part assigned to him, by arriving at the house of the obligor, who was his brother, making a formal settlement with him, and receiving the bond, which is entered up just in season to take precedence of the other creditors who were then preparing to seize upon the property of the obligor; the facts are proper to be left to the jury, as circum-

¹ Johnson v. Davis, 7 Tex. 173.

² Stiles v. White, 11 Met. 356.

³ Hood v. Palm, 8 Barr, 237.

⁴ Haldeman v. Martin, 10 Barr, 369.

⁵ Luckey v. Roberts, 25 Conn. 486.

See Preston v. Bowers, 13 Ohio St. 1.

stantial evidence of collusion.¹ But in a special action on the case for fraud, by a conspiracy between the defendant and a deputy sheriff, evidence that the defendant had applied to another deputy sheriff to commit the same fraud is held inadmissible.² It is held that a conspiracy may be proved by the testimony of an accomplice alone.³ (a)

§ 20. Under some circumstances, the person injured has the right of *electing*, whether to proceed against one party in one form of action, or against several parties jointly liable in another form. (b) Thus an action on the case lies against three proprie-

¹ Bredin v. Bredin, 3 Barr, 81.

² Handley v. Call, 27 Me. 35.

³ Yuguanzo v. Solomon, 3 Daly, 153.

(a) The following recent cases relate to a form of conspiracy now of frequent occurrence and much public interest: —

The plaintiff being a master mechanic, whose business required the employment of workmen; the defendants conspired together to extort money from him by deterring or threatening to deter others from working for him, which money he paid through a reasonable apprehension that he might otherwise be unable to prosecute his business. Held, in an action of tort, he might recover the amount paid, with damages for the injury hereby caused to his business. *Carew v. Rutherford*, 106 Mass. 1.

Stat. 6, Geo. 4, c. 129, § 3, makes it a punishable offence, "by threats or intimidation, or by molesting or in any way obstructing another," to "force or endeavor to force any" "person engaged in carrying on any trade or business," "to limit" "the number or description of his" "workmen." Held, applicable to a threat by a workman to his employer, made in pursuance of an illegal combination between him and fellow-workmen to carry it out, that all would immediately leave work unless the employer discharged other workmen who were then in the same service. *Walsby v. Anley*, 3 Ell. & Ell. 516.

A conspiracy by workmen to agree to quit their employer in a body, unless certain other workmen are dismissed, and to notify their employer of such agreement, is indictable. *State v. Donaldson*, 3 Vroom, 151.

An agreement among workmen is held not actionable, that they will not themselves work for less than a certain price, and enforced by a by-law of the association. *Master v. Walsh*, 2 Daly, 1.

The plaintiff's declaration set forth,

that he was a shipping-master in B.; that the defendants, in pursuance of a conspiracy to injure him in his business, and control the business of the shipping-masters of B., by compelling them to ship all their seamen from the defendants, had taken their men out of ships because the plaintiff's men were in the same, and refused to furnish and ship men to him, and prevented men from shipping with him, and notified the public that they had laid him on the shelf (meaning that they were acting against him as set forth), and publicly notified his customers and friends that he could not ship seamen for them, and prevented his getting men to ship, or getting employ as a shipping-master, and so broke up the plaintiff in his business. Also that the defendants were members of an association, composed of keepers of seamen's boarding-houses, designed to control the business of shipping seamen by requiring the members to ship only for certain rates, and to endeavor to prevent their boarders from shipping in vessels where any of the crew were shipped from boarding-houses not in good standing with the association, &c. Held, upon demurrer, the declaration did not set forth a cause of action. *Bowen v. Matheson*, 14 Allen, 499.

(b) A similar right of election sometimes applies as to who shall be the plaintiff in the suit. Thus, where goods have been levied upon and left in the possession of the owner, he may maintain trespass for their removal, as well as the sheriff, and a recovery by one will oust the other. *Browning v. Skillman*, 4 Zab. 351.

In an action on the case to recover money paid for a worthless "invention called perpetual motion," the declaration

tors of a stage-coach, upon a declaration that the coach was under their care, and that through their negligence the coach ran against the plaintiff, and injured him; the evidence being, that one of the defendants was driving, and the jury having found that the accident was occasioned by his negligent driving; although, it seems, the plaintiff might have maintained trespass against the driver.¹ But to an action on the case, in the form of tort, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners are not sued.² And although, in case of a joint trespass, as is sometimes held, the plaintiff may sue the trespassers jointly or separately; and a judgment against one without satisfaction is no bar to an action against another: yet the plaintiff can have but one satisfaction, except for costs, and, if he sues separately, must elect between the verdicts. He may elect from the more solvent or the larger judgment.³ In an action, containing but one count, against two officers, for assault and false imprisonment; evidence being given of a joint arrest and a separate assault, the plaintiff must elect on which wrong he will rely.⁴

§ 21. It is stated in a work of authority,⁵ that, where separate actions have been brought against several defendants for the same single act of trespass, the party last sued may plead the pendency of the first in abatement. Whether a recovery, against one of several parties to a joint tort, precludes the plaintiff from proceeding against any other party not included in such action, is a point upon which the decisions are conflicting. It has been held that in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in a field, where several persons are concerned, the recovery against one will be a bar to an action against the others; and that the court will, in general, on a summary application, stay the proceedings in the second action, where it is manifest that the entire damages have been recovered in the

¹ *Moreton v. Hardern*, 6 Dowl. & Ry. 275; 4 B. & C. 223.

² *Powell v. Layton*, 2 New Rep. 365. See chap. 1, § 22.

³ *Page v. Freeman*, 19 Mis. 421; *Knott v. Cunningham*, 2 Sneed, 204.

⁴ *Gainey v. Parkman*, 100 Mass. 316.

⁵ 1 Chit. Pl. 79; acc. *Smith v. Singleton*, 2 M'Mul. 184.

in both counts set out a contract, and alleged that the plaintiffs were induced to make it and pay the money by the false and fraudulent representations of the de-

fendant, &c. Held, the *gravamen* of both counts being the deceit, they were in case *ex delicto*, and there was no misjoinder. *Kendall v. Wilson*, 41 Vt. 567.

first.¹ (a) And in a very late English case it is held, that a judgment against A, for the joint act of A and B, is a bar to another action against B for the same act.² The court remark: "If it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions. Whenever there happened to be several joint wrong-doers, an unprincipled attorney might be found willing enough to bring an action against each and every of them. . . . Judgment having been recovered against one or more of the wrong-doers, and damages assessed . . . the plaintiff might proceed to trial against another . . . and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? . . . There is no authority — since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited — to show that such a plea as this would not be a good defence. . . . Notwithstanding the respect one entertains for the . . . American courts, where a different view of the law seems to be entertained, I think we are bound to follow those of our own courts." (b)

§ 22. With regard to the respective liabilities of defendants *in the same action*, it has been considered a doubtful point, whether, if the plaintiff, in an action commenced against several tort-feasors, accept a sum of money from one of them, he can afterwards sue another for the same wrong.³ And if one of several defendants in an action of trespass is arrested on a *ca. sa.*, and discharged by the plaintiff or by his consent, it is held that the court will dis-

¹ Campbell v. Phelps, 1 Pick. 62.

³ Warden v. Bailey, 4 Taunt. 67, 88.

² Brinsmead v. Harrison, L. R. 7 C. P. (Ex. Ch.) 547.

(a) On the other hand, a party, against whom a judgment has been rendered on a verdict, cannot, while the judgment remains in force, maintain an action against the other party jointly with others, alleging that said verdict was unjust and false, and was procured by them by fraud and perjury, and by a conspiracy to effect that purpose. He is estopped by the judgment. *Dunlap v. Glidden*, 81 Me. 435.

A judgment in favor of several defendants in one action is a bar to an action in another form against one of those defendants alone. Thus the assignees of an insolvent debtor brought a bill in equity, to set aside conveyances of property made by the debtor to the defendants, as made and taken either without consideration and in fraud of creditors, or by way of unlawful preference, contrary to the insolvent laws, charging the defendants, in

the common form, with combining and confederating with divers other persons to the plaintiffs unknown, and praying for relief against the defendants jointly and severally; and the court, after a hearing upon the merits, decreed that the demands, set up by the defendants in their several answers, were justly due them from the insolvent, and that the conveyances of property in payment thereof were not made in violation of the insolvent laws, and dismissed the bill. Held, that this decree was a bar to an action of trover by the assignees, for the same property, against one of the defendants in the suit in equity. *Bigelow v. Winsor*, 1 Gray, 299.

(b) *Brinsmead v. Harrison*, L. R. 7 C. P. (Ex. Ch.) 547, per Kelly, C. B. But see the cases cited in this opinion; also, § 20, § 25, n.; *Murray v. Lovejoy*, 2 Cliff. 191.

charge the others from custody, and order satisfaction to be entered of record, upon their stipulating to bring no action on account of their arrest and imprisonment.¹ (a) And where several defendants sever in their pleadings, and separate verdicts are found against them, if the plaintiff remits damages as to some of the defendants, judgment cannot be entered up against them, for damages found against a co-defendant.²

§ 23. Inasmuch as the liability of several persons for the same tort is originally separate as well as joint, it does not lose this character by the mere commencement of a joint action against them; but such action may proceed to different results with regard to the different defendants. Thus, where there is no evidence against one, he is entitled to judgment.³ So in trover against two for a joint conversion, the plaintiffs obtained judgment by default against one, and then withdrew their action against the other, upon receiving from him partial satisfaction for the wrong, and agreeing no further to prosecute him personally therefor. Held, that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, de-

¹ Allen v. Craig, 2 Green, 102.

³ Hamilton v. McGee, 19 Md. 43.

² Golding v. Hall, 9 Port. 169.

(a) In a late case, the following somewhat nice distinctions are made:—

The discharge of one trespasser is that of all.

In case of separate judgments against joint trespassers, there can be but one satisfaction of the damages, but the costs can be collected on all the judgments.

If, pending separate suits, one is settled, and the defendant discharged, although it was the mutual intent that the settlement should not affect the other suits, yet such suits are thereby discharged, and no recovery can be had in them of nominal damages or costs. *Ayer v. Ashmead*, 81 Conn. 447. (In this case, Butler, J., delivered an elaborate and learned dissenting opinion upon the last point.)

It has been held, that, where a joint judgment is fully paid by one defendant, it cannot be kept alive for his benefit against another. Thus one of two judgment debtors paid the amount of the judgment, but, instead of the execution being returned satisfied, it was, with the consent of the creditors, returned unsatisfied, and an alias execution taken out, upon which the other judgment debtor was committed, with the view to compel him to contribute his share of the debt for the relief of him who had made the payment. Upon *audita*

querela, it was held, that the alias issued improvidently, and that the imprisonment under it was unlawful. *Brackett v. Winslow*, 17 Mass. 153. As to the effect of a release by one tenant in common, see *Gock v. Keneda*, 29 Barb. 120.

Three suits between the same parties may be consolidated. *Crawford v. French*, 25 Tex. (Supp.) 436.

In an action for land against several defendants for distinct causes, especially where one claims under a title asserted by the plaintiff; a severance should be granted on his motion. *Ballard v. Perry's*, 28 Tex. 347.

So although filed not till several days before the trial, when it does not appear that the adverse party is prejudiced thereby. *Ibid*.

Claimants of a right of common in lands, which A had entered upon and inclosed, in order to assert their claim, signed a document, authorizing each, and B and C for each, to enter upon the land and remove the fences, which B and C accordingly did. Several actions having been brought by A against all of them, held, each could plead several pleas, justifying under the title of the others and his own. *Church v. Wright*, 15 C.B. N.S. 750.

ducting therefrom the amount received from his co-defendant, by way of compromise, for *his* liability.¹ And in an action of trover against several defendants, the refusal of the presiding judge to instruct the jury, that they are authorized (if they so find) to return a verdict against some of them, and in favor of the others, was erroneous.² But exceptions, for that cause, will not be sustained, where the jury found specially that there was no conversion by the defendants, or either of them; for, in such case, the instruction, had it been given, could have been of no benefit to the plaintiff.³ So W., having been made an agent to settle a claim which the plaintiff had against divers persons, for a joint assault, settled with two of them, and gave each of them a writing indemnifying them against any claim the plaintiff might have against them, growing out of such assault. Held, that this was a full discharge as against the plaintiff in favor of these two.⁴ Held, also, that, if it did not appear that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons engaged in the assault.⁵ So in trespass *qu. claus.*, it is competent for the jury to acquit one defendant and find the other guilty, and assess damages against him.⁶ (a) So, in an action in tort against six, the plaintiff may recover a verdict against two.⁷ And the same rule prevails, although the tort also involves a breach of contract, if the action is substantially in tort. Thus, in an action on the case in the King's Bench, against ten defendants, the plaintiff declared, that, before and at the time of the grievances complained of, they were proprietors of a stage-coach for the con-

¹ *Heyer v. Carr*, 6 R. I. 45.

² *Powers v. Sawyer*, 46 Me. 160.

³ *Ibid.*

⁴ *Eastman v. Grant*, 34 Vt. 387.

⁵ *Ibid.*

⁶ *Blackburn v. Baker*, 7 Port. 284.

⁷ *Cooper v. South*, 4 Taunt. 802.

(a) But it is held error for the judge, after the issue is made up, and a jury sworn, to order the jury, at the instance of the plaintiff, to find a verdict of acquittal as to one of the defendants. *Gearhart v. Smallwood*, 5 Mis. 452.

Where there is no evidence whatever, tending to show a liability on the part of one of two defendants, the court should, on motion, direct the jury to find a separate verdict in his favor. Though such motion should, according to the practice of the court, be made at the close of the plaintiff's case; it is a matter within the discretion of the judge, depending on the probabilities of the case; and where a motion is then made and not overruled as premature, the defendants ought not to be prejudiced, by failing to make a second

motion after all the evidence is in. *Brown v. Lewis*, 25 Mis. 335; *Benoist v. Sylvester*, 26 Mis. 585.

The court cannot direct the acquittal of one, unless a nonsuit would have been proper on the evidence, or the verdict against him would have been set aside as against evidence. *Montfort v. Hughes*, 3 E. D. Smith, 591.

An action of ejectment was brought against five defendants, who entered into the consent rule jointly, and pleaded jointly. They severally possessed the premises in separate parts; and, the jury having found each defendant separately guilty as to the part in his possession, and not guilty as to the residue, judgment was rendered accordingly. *Jackson v. Woods*, 5 Johns. 278.

veyance of passengers for hire from A to B, and they received the plaintiff as an outside passenger, to be safely conveyed thereon from A to B for hire; and by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was upset; by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favor of the other two, and judgment being entered accordingly; held, that, as the action was founded on a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber in error.¹ But, where several defendants in trespass plead one plea, and a joint verdict and damages are found against all, judgment must be rendered jointly against all. And if the verdict be set aside as to part, no judgment can be rendered against the others.² Though, where part are acquitted and part found guilty, setting aside the verdict as to the latter does not affect its validity as to the former.³

§ 24. In trespass against several, a general verdict for the plaintiff is equivalent to finding all the defendants guilty.⁴ And in an action of trespass against four, where the case is submitted to the jury as to all the defendants, a verdict of guilty against three, assessing the damages, is good, though it does not find the fourth not guilty.⁵ So a declaration alleged that both of two defendants committed the assault. Each separately pleaded *non cul.*, and that the plaintiff committed the first assault upon one of the defendants, who was the father of the other, upon all which pleas issue was joined. The verdict was, that "as to first issue, the defendants are guilty of the premises within charged upon him, in manner and form as the plaintiff hath within alleged," and, "as to the other issue, that the defendants, of their own wrong, and without any such cause as they within by pleading have alleged, assaulted the plaintiff, in manner and form as he hath within alleged." Held, a substantial finding by the jury on the matter in issue, and sufficient to support a final judgment in favor of the

¹ *Bretherton v. Wood*, 6 Moo. 141.

² *Cunningham v. Dyer*, 2 Monr. 50.

³ *Brown v. Burrus*, 8 Mis. 26.

⁴ *Sutliff v. Gilbert*, 8 Ham. 405; *Cane v. Watson*, 1 Morris, 52.

⁵ *Wilderman v. Sandusky*, 15 Ill. 59.

plaintiff.¹ So, where there are several pleas in replevin against two, and a verdict on one for one of the defendants, and a judgment for a return of the property in favor of both; this judgment, though informal, cannot be taken advantage of by the plaintiff.² But it is held, that, in a joint action of trespass against several defendants, there cannot be a nonsuit as to one and a verdict against others.³

§ 25. The principle of *severance*, however, is held not to apply to *the award of damages*, (a) although all the defendants may not be equally culpable.⁴ But it is held, that, when a joint trespass is proved, the jury are to estimate the damages according to the amount in their opinion *the most culpable* ought to pay.⁵ So in trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and a joint judgment.⁶ The plaintiff is entitled to a joint verdict; and, if the damages are severed and apportioned, he may set aside the verdict and have a *venire de novo*, or enter a *nol. pros.* against all but the one whom he elects to charge, and have judgment entered against him.⁷ And the law does not require the court to allow separate trials, or to direct a separate assessment of damages.⁸ The former is matter of discretion with the court.⁹

§ 25 a. But the contrary doctrine had been held, that, in trespass for assault and battery against several defendants, who pleaded jointly not guilty, a verdict might be found for several damages.¹⁰ And in trespass *qu. claus.* against several, where the evidence was of three distinct trespasses, each of which was committed jointly by some of the defendants only (all of them being on the close at the same time), and part of them were defaulted, and part pleaded not guilty; it was held that the damages for each trespass were rightly assessed jointly against those who jointly committed it; and the damages for the several trespasses were rightly assessed

¹ Mitchell v. Smith, 4 Md. 403.

² Gotloff v. Henry, 14 Ill. 384.

³ Revett v. Bowne, 2 Moo. & P. 12.

But see 19 Md. 43.

⁴ Eliot v. Allen, 1 Com. B. 18.

⁵ Clark v. Bales, 15 Ark. 452.

⁶ Gerrish v. Cummings, 4 Cush. 391.

⁷ Layman v. Hendrix, 1 Ala. 212.

⁸ Allen v. Craig, 1 Green, 294; Johnson v. Hannahan, 3 Strobb. 425.

⁹ Sawyer v. Merrill, 10 Pick. 16; Clement v. Wafer, 12 La. Ann. 599.

¹⁰ Bevin v. Linguard, 1 Brev. 503; Chapman v. House, 2 Str. 1140; Henry v. Sennett, 3 B. Monr. 311.

(a) It is held that, if *separate* suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have only one satisfaction; and he may elect *de melioribus damnis*, and issue his execution against one of the defendants; and

the others must pay the costs of the suits against them respectively. Livingston v. Bishop, 1 Johns. 290. See Gregory v. Cotterell, 18 Eng. L. & Eq. 99; 35 Barb. 303; Berry v. Fletcher, 1 Dill. 67; also, § 21.

severally. In such case, the costs are to be taxed, and execution issued therefor jointly, against all the defendants, and several executions for damages.¹ So, when two are sued jointly for trespass upon land, and the declaration alleges joint trespasses on certain days, there may be a verdict against both jointly, and a joint assessment of damages for trespasses in which they united; but there cannot be a verdict against both jointly, and a separate assessment of damages against each, for any trespasses committed by them separately at different times.² So although, in an action of trespass against several, who plead jointly, if the jury find them guilty jointly, they should assess the damages jointly against all, and should assess against all who are found guilty the amount which they think the most guilty ought to pay; and it is error for the court to instruct the jury to sever the damages, and assess respectively what in their opinion each party found guilty ought to pay: yet the error has been held not to be one of which a defendant may complain, it not being to the disadvantage of any defendant. And, if the jury, by mistake, assess several damages, the plaintiff may enter a *nol. pros.* as to some, and take judgment against one.³ So where the court refused to allow separate trials in an action against two defendants for a joint trespass, but instructed the jury that they might make a distinction in the assessment of damages, and the jury made no such distinction; it was held that the refusal of the court was proper.⁴ So, in an action of trespass against three defendants, the jury assessed \$7.83 damages against each, stating the aggregate amount at \$23.49. The court informed the jury, that the law required joint damages, and directed a verdict to be drawn up in proper form for the sum of \$23.49 against the three defendants. Held, the verdict was legal and proper.⁵ (a) So where the jury, in an action of trespass

¹ Proprietors, &c. v. Boulton, 4 Mass. 419; Kempton v. Cook, 4 Pick. 305.

² Bosworth v. Sturtevant, 2 Cush. 392.

³ Crawford v. Morris, 5 Gratt. 90.

⁴ Johnson v. Hannahan, 3 Strobb. 425.

⁵ Fuller v. Chamberlain, 11 Met. 503.

(a) The case of Buddington v. Shearer, 20 Pick. 477, was an action of trespass, founded upon a statute, which provides that "every owner or keeper of any dog shall forfeit, to any person injured by such dog, double the amount of damage sustained by him." It was proved that the mischief was done by a dog belonging to one Mowry, together with another dog alleged to belong to the defendants. The jury were instructed that the owner of each dog was liable for all the damage done by both, while they were together;

but, on exceptions, this instruction was held erroneous. Wilde, J., says: "The law was laid down differently in the action of Russell v. Tomlinson et al., 2 Conn. R. 206, an action founded on a similar statute of the State of Connecticut; and we are of opinion that that case was rightly decided, for the reasons there stated. The action was brought against two owners of dogs who owned the dogs severally. And the court held that a joint action could not be maintained against them, although the mischief were done by the

against two joint trespassers, returned the following verdict: "We, the jury, find A \$150, and B \$100, and all the costs to be paid by A and B, and \$50 damage to be paid by A;" it was held, that the legal effect of the verdict was, that the jury intended to find \$200 damages against A, the principal trespasser, and that a joint judgment should be entered against both defendants for that amount, and a *remittitur* entered as to the \$100 found against B.¹

§ 26. Although, in trespass against several defendants, who jointly plead not guilty, one of them, against whom there is no evidence, may be acquitted, and a verdict taken against the others; it is otherwise as to a joint plea of justification, under which, if it be not supported as to all the defendants, none of them can be protected.²

§ 27. In trespass against several defendants, where one was not served with process, and, on trial before a justice of the peace, judgment was rendered against those who had been summoned, and, upon an appeal taken by them, judgment was rendered not only against them, but also against the defendant not summoned; it was held, that as to him the judgment was a nullity.³ But in trespass against A, B, and C, A and B were taken, and C returned *not found*. The plaintiff declared against A and B, *simul cum*. C pleaded *not guilty*, and the jury found a general verdict of guilty. A and B moved in arrest of judgment, on the ground that the plaintiff could not proceed, until all the defendants were brought into court. Held, the plaintiff might, at his election, proceed against one or more of the defendants; and the declara-

¹ Simpson v. Perry, 9 Geo. 508.

² Drake v. Barrymore, 14 Johns. 166;

Gleason v. Edmunds, 2 Scam. 448. See Settle v. Alison, 8 Geo. 201.

³ Prichard v. Campbell, 5 Ind. 494.

dogs jointly; but that each owner was liable only for the mischief done by his own dog. There may be some difficulty in ascertaining the quantum of damage done by the dog of each, but the difficulty cannot be great. If it could be proved what damage was done by one dog, and what by the other, there would be no difficulty; and on failure of such proof, each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one dog than by the other. But whatever the difficulty may be, it can be no reason why one man should be liable for the mischief done by the dog

of another." Acc. Denny v. Correll, 9 Ind. 72.

Where a statute provides that every owner of a dog shall cause it to be registered, &c., and afterwards that whoever keeps a dog not thus registered, &c., shall forfeit a certain penalty; a keeper, who is not the owner, is liable therefor. Jones v. Com., Mass. S. J. C. 1860.

The somewhat fanciful and amusing application of the maxim *de melioribus damnis* has been recently made; that, where two dogs, of different sizes, kill sheep in the dark, the jury have a right to determine, in the absence of direct proof, that the larger dog killed the greater number of sheep. Wilbur v. Hubbard, 35 Barb. 308. See Com. v. Canada, 107 Mass. 406.

tion, though informal, was good after verdict.¹ So where one of three defendants in trespass before a justice of the peace appealed, and the plaintiff filed a declaration against him alone, and the defendant demurred to the declaration on that ground, and because it set out an offence different from that described in the warrant; the demurrer was overruled.² And where, in an action of assault and battery against two defendants, one only is taken, and the plaintiff declares as against joint debtors, stating one to be taken and the other not found; the declaration, though perhaps the subject of special demurrer, will not be set aside as irregular.³ So where the plaintiff declared against A and B for a joint trespass, and A suffered judgment to be rendered against him by default, and judgment was rendered against B upon trial, and damages were assessed against A at the same amount with the judgment against B, and the case was passed to the Supreme Court upon exceptions taken by B; held, not erroneous.⁴

§ 28. In trespass against three, judgment was rendered against all the defendants; on review, the plaintiff obtained a verdict against two only, and for increased damages; and the third was allowed to tax the costs of travel and attendance for himself and all the witnesses used in the defence, both on the first trial and on the review.⁵

§ 29. In trespass for an assault and battery against two defendants, a verdict was rendered against both, and joint damages less than *four pounds* assessed. The plaintiff reviewed the action, and upon the second trial a verdict was found for one of the defendants and against the other, and damages assessed against the latter above £4. The first defendant recovered his costs, and the plaintiff recovered costs against the second; but whether costs of both trials, or of the review only, was held doubtful.⁶

§ 30. Where A recovers a judgment against B and C for an assault and battery, B being insolvent and C much embarrassed; it is held that A may have his judgment applied in satisfaction or set-off, against a judgment which B had recovered against A for an assault and battery, and A may sustain a bill in chancery for that purpose.⁷ (a)

¹ *Rose v. Oliver*, 2 Johns. 365.

² *Blassingame v. Graves*, 6 B. Monr.

38.

³ *Jarvis v. Blennerhasset*, 18 Wend. 627.

⁴ *May v. Bliss*, 22 Vt. 477.

⁵ *Durgin v. Leighton*, 10 Mass. 56.

⁶ *Galloway v. Pitman*, 3 Mass. 408.

⁷ *Simpson v. Hart*, 14 Johns. 68. See *Howe v. Sheppard*, 3 Sumn. 133.

(a) The most frequent case of joint lation of *partnership*. Partnership, however, is itself a *contract*, and the law

relating to it falls almost exclusively under the head of contracts, either as between the partners themselves, or in reference to their joint or several relations to third persons. A few miscellaneous points may be stated, pertaining to torts or wrongs.

Where persons enter into a copartnership, with a fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, it is held that such persons cannot maintain an action of trespass *qu. claus. jointly* against a person who forcibly enters the storehouse and seizes the goods. *McPherson v. Pemberton*, 1 Jones, 378.

An action lies against one, who fraudulently induced the plaintiff to enter into a general copartnership, with one who was the insolvent debtor of the defendant; and afterwards induced the copartners to assume all the debts due him from the insolvent, and then seized the plaintiff's property, in satisfaction of the debts. *Bean v. Bean*, 12 Mass. 20.

If after the dissolution of a partnership, having outstanding debts, an insolvent partner sells a part of the partnership property, for the purpose of raising money to pay his individual debts, and the purchaser, at the time of the purchase, has full knowledge of the insolvency of such partner, and of his object in making the sale; the sale is fraudulent and void. *Geortner v. The Trustees, &c.*, 2 Barb. 625.

Where one partner without the knowledge of the other, by false and fraudulent representations made on behalf of the firm, procures an indorsement of an obligation of the firm, of which they have the benefit; both partners are liable to arrest for the fraud. *Sherman v. Smith*, 42 How. Pr. 198.

In general, one partner may be held responsible for the wrongful act of another, if connected with the partnership business.

The managing partner of a mining copartnership refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, and there was subsequently a notice by the attorney for the defendants, offering to deliver up tools that were in the same building with the ore, but the notice was silent as to the ore. Held, evidence of conversion by all the partners. *Lloyd v. Bellis*, 37 Eng. L. & Eq. 545.

So, to support trover for notes against a partnership, it is only necessary to show that the conversion complained of was a partnership transaction. *St. John v. O'Connel*, 7 Port. 466.

And in trover, the allegation that the defendants were partners is immaterial, and need not be proved. *Head v. Goodwin*, 37 Me. 181.

But there is no legal presumption, that one partner concurs in the wrongful acts of another; and he is not liable therefor, unless they were done within the proper scope and business of the partnership, or were authorized or adopted by him. *Taylor v. Jones*, 42 N. H. 25.

Where property, debts, and demands are transferred and assigned by partners to their creditor as security for his debt and against an indorsement, the title vests in the creditor, with the right of possession and absolute dominion, subject only to the right to redeem. And if the creditor intrusts such property with the partners, to sell and collect the same, as his agents and factors, and pay over the proceeds to him, they do not become liable, upon a sale of the property by them, as tort-feasors, as upon an unauthorized disposal thereof, so as to authorize an action of trover against any of them alone. Their liability rests upon contract, and not on tort, and is necessarily joint and not several. *Harris v. Schultz*, 40 Barb. 315. Hence an action for refusal to account for and pay over the proceeds must be brought against both. And if brought against one only, the objection of non-joinder is, in New York, properly taken by demurrer. *Ibid.*

Questions also arise in reference to the liability of the undivided interest of a partner to be taken for his debts.

If an officer attach and take possession of personal property of a firm on a writ against one partner, who has no equitable interest in such property, he is a trespasser. *Cropper v. Coburn*, 2 Curt. 465.

A sheriff attached partnership property on a writ against the partnership, and afterwards, while the property was in his possession under that attachment, returned an attachment of the same property on a writ against one of the partners. Held, that, so long as the former attachment subsisted, he was not liable, in an action of trover, in favor of one who claimed under a sale from the partnership, but was unable to hold against the partnership creditors; notwithstanding the partnership debt was afterwards satisfied, by the sale of other property attached at the same time. *Page v. Carpenter*, 10 N. H. 77.

The defendant, an officer of the Palace Court, seized under a *fi. fa.* against A. partnership effects of A and B, and sold them to various purchasers, who carried them away. In trover by the assignees

of B (who had become bankrupt), held, the seizure and sale did not amount to a conversion; but, in the absence of any evidence to show in what proportions the partners were interested, the assignees were entitled to a moiety of the proceeds. *Mayhew v. Herrick*, 7 Com. B. 229.

One partner may either lose his claim and right of action against a third person, or become liable for the wrong of another partner by subsequent *ratification* or *adoption*.

The stock and tools of trade of a partnership were attached at the suit of a creditor, and the officer delivered the same to the creditor, taking his accountable receipt therefor; and afterwards it was agreed between the creditor and one of the partners, that the creditor should take the property at an appraised value and appropriate it to the debts of the partnership; and they gave notice of this arrangement to the officer, and discharged him from his liability on account of the attachment. The other partner having brought trover against the officer, the proceedings were explained to him, and he said he was convinced that the partnership was insolvent, that the property had gone to pay its debts, and that the creditor had made an advantageous disposition of it; but he nevertheless continued to prosecute his action against the officer, saying that, as the affair had begun in the law, it might end in the law. Held, the question whether the plaintiff had approved and ratified the doings with a full knowledge of all the facts, was for the jury; and, if he had, the defendant was entitled to a verdict. *Hewes v. Parkman*, 20 Pick. 90.

Where one of two partners obtains

goods by fraudulent representation as to the solvency and credit of the firm, and afterwards the firm sells the goods, *replevin* in the *cepit* lies against both. *Olmsted v. Hotailing*, 1 Hill, 317.

Where goods are obtained for the use of a firm by the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act, and will be placed in the same situation, with reference to the rights of the vendors, as if he had directed his partner to procure the property, or had concurred with him in the transaction. So one is liable, either in *assumpsit* or case, for the consequences of frauds practised by another in the transaction of the partnership business; although he was entirely ignorant of such frauds, and derived no benefit therefrom. So, where one partner, on being notified of a fraud committed by another, and that the firm will be held liable therefor, omits to repudiate or disaffirm what has been done by his copartner, he will be held to have adopted and ratified the fraud, and will from thenceforth be regarded as a joint wrongdoer. *Hawkins v. Appleby*, 2 Sandf. 421.

Where two partners wrongfully take property, and one afterwards settles with the owner for one-half thereof, the owner may bring trover against the other for the remaining half. *McCrillis v. Hawes*, 38 Me. 566.

In an action against a firm for procuring goods by actual, intentional fraud, implying moral turpitude, and punishable by imprisonment, a defendant cannot be found guilty merely because his partner committed the fraud. *Stewart v. Levy*, 36 Cal. 159.

CHAPTER XXXIV.

CORPORATIONS.

- | | |
|--|--|
| 1. General liability of corporations for tort. | 4. Fraud, liability for agents, &c. |
| 3. For what torts and in what actions corporations are liable. | 7. Refusal of subscription to new stock. |
| | 8. Expulsion of members.† |

§ 1. IN immediate connection with *joint* rights and liabilities, may be considered the subject of torts or wrongs committed by or against *corporations*. (*a*) A corporation being for the most part a creature of statute, the statute law of each State, and the charter of each corporation, are of course to be referred to, in settling the powers and duties of particular corporations or classes of corporations. It is, however, inconsistent with the plan of the present work, to do more than state the general rules of law upon the subject, independent of express legislation.

§ 2. It has been sometimes suggested, that a corporation is not liable, as such, for a tort.¹ But the better opinion is, that such liability has been always recognized by the English law;² and this may now be considered a well-settled doctrine. Thus an action lies against a turnpike company, for the value of a horse killed by the fall of a bridge on the road.³ Or against a canal company, for damage caused by the want of repair of its locks.⁴ So for not repairing a creek, which the corporation was bound to keep in repair.⁵ Or against a turnpike company, for stopping a water-course, and thus overflowing the plaintiff's tanyard.⁶ Or an omnibus company, for so driving their coaches as to interfere with the plaintiff's use of the road.⁷ So against a corporation having the

¹ 1 Kyd, 225. See *Tompkins v. The Floyd, &c.*, 19 Ind. 197; 23 Ill. 332.

² *Chestnut, &c. v. Rutter*, 4 S. & R. 6; *Yarborough v. Bank, &c.*, 16 E. 6; *Losee v. Buchanan*, 11 Am. Law Reg. 194.

³ *Townsend v. Susquehannah, &c.*, 6 Johns. 90.

⁴ *Riddle v. Proprietors, &c.*, 7 Mass. 169. See *Quincy v. Newcomb*, 7 Met. 276.

⁵ *Mayor, &c. v. Turner*, Cowp. 86.

⁶ 4 S. & R. 6.

⁷ *Green v. London, &c.*, 29 Law J. C. P. 13.

(*a*) An action of trespass lies in favor of a corporation against a sheriff for the wrongful taking and conversion of prop-

erty, notwithstanding formal defects in its organization. *Persse v. Willett*, 1 Rob. (N. Y.) 131.

return of writs, for a false return.¹ So where, by contract made through its president or agent, a *cotton-pressing* corporation agreed to unload a boat, and the corporation's slaves took possession of the cotton for that purpose, and carelessly sunk it; the corporation was held liable.² So where the wall of a church, negligently permitted to stand after the rest of the building has been burned, falls upon a person passing along the street; the corporation are liable.³ And a corporation may be liable for exemplary damages.⁴

§ 3. With regard to the *nature* of the wrongs for which a corporation, as such, may be held responsible; it has been said that an action for *malicious prosecution, slander, false imprisonment, or assault and battery*, cannot be maintained against a corporation aggregate, but must be brought against the individuals doing the deed.⁵ But, on the other hand, it is held, that an action on the case, for a vexatious suit, may be sustained against a corporation aggregate.⁶ And more particularly with regard to the *form* of remedy against a corporation for a tort or wrong; it was formerly supposed, that the action of *trespass* would not lie against a corporation, upon the technical ground that it cannot be subject to a *capias*, which is the proper process in that action.⁷ But it is shown by Mr. Angell — on Corp. 389 — that municipal corporations have been held thus liable from very ancient times. Thus trespass was maintained against a *mayor and commonalty* for distraining beasts which were exempted from toll.⁸ So also for disturbing the plaintiff in taking deodands and other profits in a river.⁹ And it is now well settled, that trover or *trespass* will lie against a corporation aggregate or a municipal corporation for the acts of its officers or agents done in the performance of their ordinary duties, within the scope of their authority, or by special directions of the corporation.¹⁰ (a) So a corporation may be sued for an assault

¹ *Argent v. St. Paul's, &c.*, cited in 2 T. R. 16.

² *Marlatt v. Levee, &c.*, 10 Louis. 583.

³ *Rector, &c. v. Buckhart*, 3 Hill, 193.

⁴ *Atlantic v. Dunn*, 19 Ohio St. 162; *Jeffersonville v. Rogers*, 28 Ind. 1.

⁵ *Childs v. Bank, &c.*, 17 Mis. 213.

⁶ *Goodspeed v. The East Haddam, &c.*, 22 Conn. 530.

⁷ 1 Kyd, 223.

⁸ 9 Hen. VI. 1; *Smith v. Birmingham, &c.*, 1 Ad. & Ell. 526.

⁹ 45 Edw. III. 23.

¹⁰ *Watson v. Bennett*, 12 Barb. 196; *Allen v. Decatur*, 23 Ill. 332; *The President, &c. v. Wright*, 5 Ind. 252; *Dater v. The Troy, &c.*, 2 Hill, 629; *Maund v. Mon. Canal, &c.*, 4 Man. & Gr. 452; *Eastern, &c. v. Broom*, 2 Eng. L. & Eq. 406; *Edwards v. Union Bank*, 1 Branch, 136.

(a) It has been sometimes held that case is the proper action against a corporation, which causes a commission of a trespass by its agent. *Hamilton, &c. v. Turnpike, &c.*, *Wright*, 603.

But, on the other hand, case cannot

be maintained against a corporation for injuries *wilfully and intentionally* committed by its servants, and not produced in the course of their regular employment as servants. *Illinois, &c. v. Downey*, 18 Ill. 259.

and battery committed by their servant, acting under their authority.¹ (a)

§ 3 a. And in this connection it may be added, as a rule perfectly established, and applicable alike to all wrongs and forms of action, that corporations are liable for injury caused by the wrongful acts and neglects of their *servants and agents*, done in the course and within the scope of their employment.² Or where, under like circumstances, an individual would be liable.³ Subject, however, to the following limitations. To render a corporation liable for the wrongful acts of its officers, it must either appear that they were expressly authorized to do the act, or that it was *bonâ fide* done, in pursuance of a general authority in relation to the subject of it, or adopted or ratified by the corporation.⁴ Where an affirmative act is complained of, the only way in which a corporation can be liable, in an action on the case, is either by their organized action through the board of direction, or for the acts of their agents, on the principle of *respondeat superior*.⁵ And the obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence.⁶ It is said, "Where the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors, and are neglected, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of that neglect."⁷

¹ Moore v. Fitchburg, 4 Gray, 465.

² Ang. on Corp. 302; King v. Paterson, &c., 5 Dutch. 504.

³ First Baptist, &c. v. Schenectady, &c., 5 Barb. 79; State v. Morris, &c., 3 Zab. 360.

⁴ Clark v. Peckham, 9 R. I. 455; per

Shaw, C. J., Thayer v. Boston, 19 Pick. 516.

⁵ Sherman v. The Rochester, &c., 15 Barb. 574.

⁶ King v. Boston, &c., 9 Cush. 112.

⁷ Per Lord St. Leonards, Bargate v. Shortridge, 31 Eng. L. & Eq. 44.

(a) Recent cases fully confirm the statements in the text.

A joint action for an assault and battery can be maintained against a corporation and an individual. *Brokaw v. New Jersey*, 3 Vroom, 328.

An action lies against a railroad company for false imprisonment, if committed by its authority; though not under seal, but proved by circumstances. *Goff v. Great*, 3 Ell. & Ell. 672.

An action for malicious prosecution may be maintained against a corporation. *Vance v. Erie*, 3 Vroom, 334.

A somewhat remarkable case of this kind recently occurred in England; where the proprietor of the group known as

"the Aztec children" brought an action against a gas-company for maliciously prosecuting him upon a charge of having preferred a fraudulent claim against the company, and caused him to be imprisoned under circumstances of great indignity. The claim was for a loss alleged to be caused by an explosion of the defendants' works, which supplied gas to the building occupied by the plaintiff. The defendants finally assented to a verdict against them for £1500, the lord chief baron having strongly condemned the institution of the criminal proceedings by the company. *Morris v. The Gas-Light Co.*; Court of Exchequer. The Standard.

Upon these grounds, a corporation is held not liable for a wilful trespass of a person employed by it, although the act be authorized and sanctioned by its president and general agent.¹ And although an authority by a corporation to commit a tort need not be under seal; yet, in order to sustain an action of trespass for the act of its agent upon the ground of ratification, such ratification must be clearly proved. Thus, where the plaintiff had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector; and, at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings: held, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to them.² (a)

§ 4. With reference, more particularly, to the liability of corporations for *fraud*: if the directors of a joint-stock company, in the course of their dealings on behalf of the company with third parties, by fraud induce such parties to contract with them, and the company benefits by the transaction; the company will be bound by such fraud, even where the fraud consist in false reports submitted by the directors at their annual meetings to the company. Thus, in an action by the N. Joint-Stock Company, bankers

¹ *Vanderbilt v. Richmond, &c.*, 2 Comst. 479.

² *Eastern, &c. v. Broom*, 2 Eng. L. & Eq. 406.

(a) Opinion by THAYER, J. :—

A case stated. It appears that the plaintiff was the owner of several lots of ground on Eadline Street, on which he erected a number of dwelling-houses fronting on said street, and he applied to the water department to have the Schuyl-kill water brought into Eadline Street for the accommodation of his houses there. It was accordingly brought in, and he paid the city for it \$250. The plaintiff was also the owner of some lots and houses on Story Street, which is immediately south of Eadline Street and parallel with it. When he offered to pay the city for the introduction of the water on Eadline Street, the officer of the department refused to admit the water into Eadline Street, in front of his houses, unless he would deposit the further sum of \$250 with the city to pay for the laying of water-pipes in Story Street, where none had then been laid or have been since laid. The plaintiff being unable to get the water introduced into Eadline street without complying with this additional demand to pay for water-pipes in Story street which have never been laid, paid the

sum demanded under protest and has brought this action to recover it back.

No law or ordinance or any authority whatever has been shown to us justifying the officers of the water department in making this demand or receiving this money. The case, therefore, falls within that class of cases in which money has been paid under the compulsion of a wrongful pressure exercised upon the party paying it—cases which are well-settled exceptions to the maxim *volenti non fit injuria*, and in which it has always been held that money thus wrongfully paid through necessity and the urgency of the case may be recovered back. There is no necessity here, however, to invoke this principle, for, by the case stated, it is agreed that if we are of the opinion that the city had no right to demand or receive this money then we are to give judgment for the plaintiff. We are clearly of that opinion, and accordingly

Judgment for the plaintiff for \$250, with interest from October 25, 1867. *Tenbrook v. The City*, Leg. Intell.

and brokers, for money lent to purchase shares in the company; the defendant pleaded, that the directors had in their annual reports falsely represented their affairs to be flourishing, whereas the company was insolvent; and paid large dividends, whereas such dividends were paid out of the capital; and that A, their manager, falsely representing the said shares to be of great value, induced him to purchase them, and at the same time, on the part of the company, offered to advance the money, and promised that the company would hold the shares for him until they could be sold at a profit, without his being called upon for the price; and he, relying on such representations, accepted the shares, which A accordingly bought and paid for, and still possessed. Held, on demurrer, a good answer.¹ So a demurrer to the answer, in a suit upon a stock subscription, which set up fraud, in that the company, since the defendant's cash subscription, had taken a large land subscription at enormous prices, is bad.²

§ 4 *a*. But where a corporation had different transfer books for different classes of its stock, and stockbrokers attached different values to the several classes, and a subscriber for stock, when he subscribed, was told by the officers of the corporation, that his stock would be transferable on a particular class of books, which was afterwards refused; it was held, that this was not a fraud which would avoid the contract, but that the remedy of the stockholder was by an action for damages.³ So fraudulent representations by an officer of a corporation at a public meeting, in presence of a majority of the directors, but not in pursuance of any authority from their board, will not discharge a subscriber to stock.⁴ And parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber, who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed.⁵ So, in an action for calls against a shareholder of a joint-stock company, a plea, that the defendant was induced to become a shareholder by the fraud of the plaintiffs, was held bad, for not averring that the defendant had repudiated the contract, and had done nothing under it to make him liable as a shareholder.⁶ And a discharge from a stock

¹ *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1.

⁴ *Buffalo, &c. v. Dudley*, 4 Kern. 336.

⁵ *Vicksburg, &c. v. McKean*, 12 La.

² *Maccoun v. Indiana, &c.*, 9 Ind. 262; Ann. 638.

Hornaday v. Lane, Ib. 263.

⁶ *Deposit, &c. v. Ayscough*, 37 Eng.

³ *Lohman v. New York, &c.*, 2 Sandf. 39. L. & Eq. 56.

subscription, on the ground of fraud, cannot be obtained by one who was himself a party to the fraud.¹

§ 5. The president of a corporation is not *ex officio* an agent to sell the property, and his representations as to property to be sold, unless he be specifically authorized, are not binding on the company.² And a fraudulent certificate of ownership of shares, over and above the limited capital stock of a corporation, by its agent intrusted with their transfer only, has been held to give no recourse for damages against the corporation, to one taking it *bonâ fide* and without notice of fraud, from the original vendee with notice, in whose hands it was void. Nor does the unauthorized issue of false and fraudulent certificates of stock, by the agent of a corporation, estop the corporation to deny its liability for damages thereby sustained by innocent purchasers.³ Thus (in a recent and leading case) Schuyler, the president and transfer agent of the defendants, issued to A, without consideration, a certificate of ownership of eighty-five shares of the defendants' capital stock. The certificate was in all respects similar to the genuine certificates, which the agent was authorized by the by-laws to give, upon a transfer of stock made upon the books, and upon the surrender of the outstanding certificate. It was, however, fraudulent, and represented no genuine stock, and no existing certificate was surrendered previous to its issue, and this was known to A. The plaintiff received the certificate, with an assignment and power of attorney in blank, *bonâ fide*, as collateral security for a loan to A upon his note, which loan was received and appropriated by Schuyler. The capital was limited by law to \$3,000,000, all of which had been duly issued previous to this transaction; and the par value of the shares was also fixed by law at \$100. After demand of payment of A, and his failure and insolvency, the plaintiff applied to the defendants to have the stock transferred, but they refused to allow it. The repayment of the market-value of the shares, at the time the certificate was issued, was then demanded and refused, and this suit was brought. In the court below, it was held, that the plaintiff might recover the market-value of eighty-five shares of the defendants' stock. But this decision was reversed by the Court of Appeals, who held, that the certificate

¹ Southern Plank, &c. v. Hixon, 5 Ind. 165.

² Crump v. U. S. Mining Co., 7 Gratt. 352.

³ Mechanics' Bank v. New York, &c., 3 Kern. 599. (But see N. Y. v. Schuyler, 34 N. Y. 30.) See Mitchell v. Rome, &c., 17 Geo. 574.

was void in the hands of A, as it was issued fraudulently, and he paid nothing for it; and Schuyler had no power to issue a certificate, except on the conditions precedent, of a transfer on the books of shares by some previous owner, and the surrender of that owner's certificate; and this was known to A. Also, because it represented no stock, and neither the directors, by whom Schuyler was appointed, nor the corporation, had power to create the stock; all the powers of the corporation in the creation and issue of stock being exhausted. Also, that the certificate was void under all possible circumstances; and the plaintiff could acquire no rights by the assignment of it, which were not possessed by his assignor; certificates of stock not being *negotiable instruments* in the sense of the commercial law, so that, by their indorsement and delivery to a person in good faith, a title to the stock they profess to represent may be acquired, although in the hands of the vendor they are spurious and void, and although the company has never recognized the transfer. Also, that an agent's apparent powers are those only which are conferred by the terms of his appointment; and for acts done within an authority thus manifested the principal is liable, but not for an act, which, though clothed with the indicia of authority by the agent, is not within his apparent authority. Schuyler had no apparent authority for his act, and his principal could give him none, and was not therefore liable. Also, that the doctrine, that the mere employment of an agent in situations of trust is a certificate of his character, and, in case he deceives others, to their injury, his employer must make compensation, is no further true, than that he must be responsible where the agent is guilty of fraud and deceit in doing his master's business, because the fraud enters into and is a part of the authorized transaction.¹

§ 6. Persons who exercise the corporate powers of a corporation may, in their character as trustees, be held liable, in a court of chancery, for a fraudulent breach of trust; and a stockholder, where the directors collude with others who have made themselves liable by negligence or fraud, and refuse to prosecute, or where the directors are necessarily parties defendants, may file a bill in behalf of himself and the other stockholders; in which case, the corporation must be made a party defendant.²

§ 7. The claim of a stockholder to *subscribe for new stock* may

¹ *Mechanics' Bank v. New York, &c.*,

² *Colquitt v. Howard*, 11 Geo. 556.

⁴ Duer, 480.

sometimes give occasion for an action against the corporation. But, in an action by a stockholder, for refusing to permit him to subscribe for new stock authorized to be issued, and of which he was entitled to a pre-emption, it is a material averment, and must be proved, that he demanded and offered to subscribe.¹ (a)

§ 8. A member of a corporation may claim damages of the company for *expelling* him without previous hearing.² But where the rules required that a member should be summoned before expulsion, and the affidavit stated that the complainant had been expelled without any summons ; it was held, that this was no ground for an application to justices, after an award made by arbitrators, who had heard and decided upon the objection.³ More especially, where, under the constitution and by-laws of a beneficial society, each member was entitled to receive in case of sickness three dollars per week, and bound to contribute such monthly dues as the society might declare, and entitled to twenty-four hours' notice before he could be expelled ; an action lies for an expulsion made in the absence of a member, without notice or the waiver thereof, and neither the minutes of the proceedings of the society, nor oral testimony of the statements of the secretary to the society at the time of the expulsion, are admissible in favor of the society.⁴

¹ *Wilson v. Bank, &c.*, 29 Penn. 537.

³ *Long*, 29 Eng. L. & Eq. 194.

² *Southern Plank, &c. v. Hixon*, 5 Ind. 165.

⁴ *Washington, &c. v. Bacher*, 20 Penn. 425.

(a) As to a claim for a *dividend*, see *King v. Paterson, &c.*, 5 Dutch. 82.

CHAPTER XXXV.

CORPORATIONS. — BANKS.

- | | |
|---|--|
| 1. General liability. | 12. Checks. |
| 2. Negligence in collection of notes, &c. | 16. Liability for officers and servants. |
| 5. Deposits. | |

§ 1. THE rights and liabilities of *banking corporations* are often brought in question. (a) The remark already made in reference to corporations generally, that they are peculiarly the subject of *statutory regulation*, is perhaps emphatically true of banks. Our plan, however, does not permit or require any reference to the numerous and complicated provisions of the statute law upon this important subject.

§ 1 a. Examples of the liability of a bank are as follows: A bank is held liable for the fraud or mistake of its cashier or clerk, in the *entries in its book*, and in the *false accounts of deposits*.¹ Or for the act of directors, in improperly *refusing to permit a person to subscribe for or transfer stock*.² So it is held to be the duty of a bank, to prevent the *entry of a transfer of stock*, until satisfied that the party claiming to make such transfer is duly authorized to do so. Hence an action lies against the Bank of England, for permitting stock to be transferred without authority, and refusing to pay the holder the dividends due thereon; although he knew of the forgeries six months before such dividends became payable (but not until after the transfers), concealed it from the bank, and did not demand the dividends until after the escape of the forger; mere concealment, in the absence of assent to, or adoption of, the acts of the offending party, not divesting his vested right of action.³ But a bank is not liable for the neglect of an officer who does not act as the agent of the bank in the particular transaction complained of.⁴

¹ Salem, &c. v. Gloucester, &c., 17 Mass. 1; Gloucester, &c. v. Salem, &c., Ib. 33; Foster v. The Essex, &c., Ib. 479. See Cooper v. Lampeter, 8 Watts, 125.

² Ang. on Corp. 803.

³ Davis v. Bank, &c., 9 Moore, 747.

⁴ Thatcher v. The Bank, &c., 5 Sandf. 121.

(a) No action will lie by one bank against another, for collecting its bills and presenting them for payment in a harassing manner, with a malicious intent to injure its credit. South, &c. v. Suffolk, &c., 1 Williams, 605.

§ 2. A frequent claim against banks arises out of losses, alleged to result from some neglect or mistake on their part in the *collection of notes* intrusted to them for that purpose. It is held, that, when a bill or note is forwarded to a bank, which receives and undertakes to collect it, the bank is liable, without special agreement, for any default of the agents or correspondents it employs for that purpose, in collecting or paying over the proceeds, or in fixing liability on the parties.¹ Thus, where a bank received for collection a note payable in another State, under an agreement to collect it for seven per cent., and neglected to give information of non-payment, and to return the note to the depositor within a reasonable time; it was held, that they were liable to an action.² So one bank receiving from another, for collection, a note indorsed by the cashier of the latter, is bound to present the note to the maker for payment, at maturity; and, if not paid, to give notice of non-payment to the former bank; but not, unless by express agreement, to give notice to the other parties to the note.³ So a bank receiving a note or bill for collection, upon a good consideration, at a distant place, is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, unless there is some agreement to the contrary; and has such special interest as will enable it to maintain an action for the injury sustained, without waiting for a recovery against itself.⁴

§ 2 *a*. But it is held no part of the duty of a bank to *employ counsel* and *bring suit* upon notes left with it on deposit.⁵ And the less rigorous rule than that above stated is sometimes adopted, that although a bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to transmit, or to cause the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; yet, where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default. (*a*) Thus the D. & M. Bank, at M.,

¹ Commercial, &c. v. Union, &c., 1 Kern. 203; Bank, &c. v. Triplett, 1 Pet. 25; Young v. Noble, 2 Disn. 485; Ayrault v. Pacific, 47 N. Y. 570. See Trask v. Martin, 1 E. D. Smith, 505.

² Wingate v. Mechanics' Bank, 10 Barr, 104.

³ Phipps v. Millbury, &c., 8 Met. 79.

⁴ Commercial, &c. v. Union, &c., 19 Barb. 391.

⁵ Crow v. Mechanics', &c., 12 La. Ann. 692.

(*a*) But the latter bank is held liable directly to the party injured, without reference to any account between itself and the former bank. Lawrence v. Stoning-

the plaintiffs, having discounted a number of drafts, payable in W., transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, the defendants, in Boston, their general agents, for collection. The latter having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection. The C. Bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose. The C. Bank having subsequently failed, the defendants demanded the drafts of the Bank of the M. before they became due; the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the defendants commenced an action against the Bank of the M. to recover the amount. Held, that the defendants, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection, without proof of general usage; and that, as the drafts were trans-

ton, &c., 6 Conn. 521. But see *Montgomery v. Alley*, 7 N. Y. 459.

One bank may be agent for another. *Marine, &c. v. Ogden*, 29 Ill. 248.

The demand of a note sent to a bank, as agent for collection, terminates the agency, and a refusal is evidence of conversion. *Potter v. The Merchants', &c.*, 28 N. Y. (1 Tiff.) 641.

A banker—unlike an attorney—is not liable in case, as for a tort, for failing to pay over money, collected in that capacity. The distinction is, that, in the hands of an attorney, the money collected never becomes his own; while a banker, by crediting the amount received, becomes a mere debtor of his employer. *Tinkham v. Heyworth*, 31 Ill. 519. See *Marine, &c. v. Rushmore*, 28 Ill. 463.

Money collected by bank A for bank B, placed by A with the bulk of its ordinary banking funds, and credited to B in account, becomes the money of A; which must, therefore, bear the loss resulting from any depreciation in the bank-bills, between the time of receiving them and B's drawing for the amount. *Marine, &c. v. Fulton, &c.*, 2 Wall. 252.

The plaintiff placed in the hands of the defendants, bankers at Ottawa, a draft on A in Chicago, to be sent by the defendants to B, a banker at Chicago, for collection, the proceeds to be returned by express to the defendants, who were to incur no liability. The draft was sent with instructions as agreed. B collected

it; by mistake, and contrary to orders, credited the proceeds to the defendants; and, three days after, having the money in his hands, failed and made an assignment. Held, A was the agent of the plaintiff, not the defendants, who forwarded the draft as agreed; and, no negligence being shown, they were not liable. *Fay v. Stravon*, 32 Ill. 295.

Where notes issued by a bank had been sent to it through an express company, and while on the way were stolen by an agent of the company, who destroyed them after the amount had been paid by the company to the bank; held, the payment transferred the property in the notes to the company, who might recover the amount from the bank. *Hagerstown, &c. v. Adams, &c.*, 45 Penn. 419.

The plaintiffs, bankers in the country, sent by express to the defendant, a bank in the city of New York, with which they kept an account, a sealed package of bank-notes, directed to the cashier. An employee of the express company delivered it to A, who was then, and had for some time been, assistant receiving teller, or acting as such, and who gave a receipt therefor; he being at the desk of the receiving teller, who was temporarily absent. A did not deliver it to the cashier, nor did he or the bank ever receive it or its contents. Held, the loss should fall upon the bank. *Hotchkiss v. The Artisans', &c.*, 42 Barb. 517.

ferred to the defendants by a general indorsement, that bank might transfer them in the same manner to the C. Bank, and were not bound to make a restricted indorsement.¹ And when several agents are employed by a bank with distinct and separate duties, the knowledge of the residence of an indorser, by one of those agents, who was not the proper agent to give notice, is not the knowledge of the bank, and therefore cannot be set up to charge negligence in giving notice.²

§ 2 *b*. In reference to the very frequent case of loss arising from the act or default of *notaries*; it has been sometimes held, that mere delivery to a notary for protest does not discharge the liability of the bank, and that evidence of custom is not admissible thus to restrict the responsibility of the bank.³ But it is the prevailing rule, that, although it is the duty of banks, receiving notes for collection, to place them in the hands of a notary, that they may be protested in due time, when necessary; yet, when received, in the ordinary course of business, for collection, the bank is not responsible for any failure of the notary to do his duty.⁴ And where a bank places a note for protest in the hands of the notary to whom its own business is uniformly intrusted, it will not be responsible for the failure of the notary to protest the note, or to notify the proper parties.⁵ So it is not sufficient, in answer to the *primâ facie* defence of delivering the note to a notary, for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits. He must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act.⁶ So to an action against a bank, for not duly demanding of the maker payment of a note left by the plaintiff with them for collection, it is a good defence, that the note was duly placed by the defendants in the hands of a competent notary-public, for demand and protest, and that the negligence, if any, was on his part; the defendants having been the collecting agents for the plaintiffs for more than ten years, and having invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs, and it being shown that there was

¹ *Dorchester, &c. v. New England, &c.*, 1 Cush. 177; *Mechanics' &c. v. Earp*, 4 Rawle, 384. See *Sharp v. Emmet*, 5 Whart. 288.

² *Goodloe v. Godley*, 13 S. & M. 233.

³ *Ayrault v. Pacific*, 6 Rob. 337; *Allen v. Merchants*, 22 Wend. 215; *Thompson v. Bank*, 3 Hill (S. C.), 77.

⁴ *Citizens', &c. v. Howell*, 8 Md. 530; *Agricultural, &c. v. Commercial, &c.*, 7 S. & M. 592. See *Warren, &c. v. Parker*, 8 Gray, 221.

⁵ *Baldwin v. Bank, &c.*, 1 La. Ann. 13; *Bellemire v. Bank, &c.*, 1 Miles, 173.

⁶ *Agricultural, &c. v. Commercial, &c.*, 7 S. & M. 592.

an invariable usage among the banks in Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking-hours, and, if not then paid, to put them in the hands of a notary.¹ So the plaintiff, the holder of a post-note, issued by a bank that failed before the note fell due, sent it for collection to the defendant, another bank, which caused payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged, on the ground that by law the promisors were entitled to grace, although they had, while solvent, paid such notes without grace. At the time when the note fell due, the question, whether banks were entitled to grace on their post-notes had never been decided, and there was no uniform practice as to demanding payment of such notes and giving notice to the indorsers, after the promisors failed. Held, this action, for negligence, could not be maintained.²

§ 3. In an action against a bank for negligence in failing to make a collection, evidence of the contents of a placard posted up in the bank, offering to make collections on certain terms, is admissible on the part of the plaintiff, after notice to produce it, and a failure to do so, or to account for it, without proof that the plaintiff read and acted on the faith of it.³

§ 4. In an action against a bank for undertaking to collect a note payable in another State, under an agreement to collect it for seven per cent., and for neglecting to give information of non-payment, and to return the note: it appearing that, at the time of trial, the note was barred by the Statute of Limitations, and that the bank had never until then returned it to the depositor, and there being no evidence of the insolvency of the maker; held, the measure of damages was the amount of the note, with interest, less the seven per cent.⁴ (a)

§ 5. The liability of a bank may also arise from *deposits* made in the bank. (b)

§ 6. Although a bank has no express regulation or by-law, rela-

¹ Warren, &c. v. Suffolk, &c., 10 Cush. 582.

² Mechanics', &c. v. Merchants', &c., 6 Met. 18.

³ Wingate v. Mechanics', &c., 10 Barr, 104.

⁴ Ibid.

(a) But the insolvency of a debtor may be shown in mitigation of damages. Stone v. Bank, &c., 3 Dev. 408.

(b) See Carroll v. Cone, 40 Barb. 220; Scott v. Crews, 2 S. C. 522; Maury v. Coyle, 34 Md. 285; De Feriet v. Bank,

23 La. Ann. 310; Boyden v. Bank, 65 N. C. 13; Greves v. Louisiana, 22 La. Ann. 228; School v. 1st, 102 Mass. 174; Lewis v. Park, 42 N. Y. 463; Chaffee v. Fort, 2 Lans. 81.

tive to deposits of money and other valuable articles, and no account of them is required to be kept and laid before the directors and company; yet, if accustomed to receive them, with the knowledge of the directors, through its officers, and in its buildings and vaults, it is liable for such deposit.¹

§ 7. Where a deposit of money is *general*, the money may be used by the bank for its own purposes, and the bank merely becomes the *debtor* of the depositor to that amount.² And this is presumed to be the nature of the deposit, unless the money is in a sealed packet, bag, box, or chest; which receptacles neither the bank nor its officers have any right to open.³ In case of general deposit, the bank may at any time apply it to a note of the depositor, but is not bound to do so. It may recover a judgment upon the note, and then make the application; or, in case of a suit brought by the depositor or his assignee, may make an equitable set-off of the judgment.⁴

§ 8. In general, a bank is liable only to the actual depositor; and, when payment is made to him, cannot be charged with the money a second time by a third person, although legally entitled to the money, or defrauded by the depositor.⁵

§ 9. In an action against a bank, to recover the amount of a special deposit in gold, which had been fraudulently or feloniously taken from the vaults by its cashier and chief clerk; it appeared that the directors had no notice of the nature or amount of the deposit, or of the cashier's and clerk's doings, and that the latter had no *official* right to meddle with the deposit, except to close the doors of the vault upon it after banking-hours. The bank was held not liable for the loss. The decision was predicated upon the general principle of the law of bailments, that, where a deposit is made from which the depositary derives no profit, he is liable only for *gross* negligence in relation to such deposit.⁶

§ 10. The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account that higher interest might be obtained for her money, if she purchased two houses, for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She

¹ *Foster v. The Essex, &c.*, 17 Mass. 479.

² *Bank, &c. v. Wister*, 2 Pet. 318; Am. Law Reg., Feb. 1862, 239.

³ *Dawson v. The Real, &c.*, 5 Ark. 283; *Foster v. Essex, &c.*, 17 Mass. 504.

⁴ *Marsh v. The Oneida, &c.*, Am. Law Reg., Feb. 1862, p. 239.

⁵ *Dacy v. New York, &c.*, 2 Hall, 550; *Fulton, &c. v. New York, &c.*, 4 Paige, 127.

⁶ *Foster v. The Essex, &c.*, 17 Mass. 496; *Bottom v. Clarke*, 7 Cush. 487.

assented, and gave him her deposit note, for which he gave her a fresh deposit note, for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss. Held, in an action against them, that they were liable, the jury having found, that the manager intentionally induced the lady to believe that he was acting as the agent of the bank, and also, that as local manager he had authority from the bank to make an assignment of an equitable mortgage.¹

§ 11. A bank is not bound to apply money deposited to the payment of a bill of the depositor, unless it had assented to receive such money. It is only in relation to its own dealers or customers that such assent can be implied. And a bank is not bound to receive, on deposit, the funds of every man who offers them. It has a right to select its dealers, and the cashier is the proper officer to make the selection. And, when the bank is bound to receive a deposit, it must, to render the bank liable for its application, be made with the proper officer. The receiving teller, when there is one, is the only proper officer to receive deposits. And a paying teller, receiving the funds of a stranger, and promising to apply them to the payment of a bill or a note, acts as the agent of the stranger, and not of the bank, which is not liable for any breach or neglect of his promise.² (a)

§ 11 a. In a case of deposit by an agent, the liability of the bank to the agent ceases, when the principal claims the money.³

§ 11 b. In an action to recover from a bank in B. a deposit in gold, the plaintiff introduced in evidence an entry in his bank-book as follows: "1861, Dec. 30, cash (coin) \$3,000." Held, evidence was admissible that, according to the general and well-known usage of the banks in B., the entry imported an agreement to return the deposit in kind, notwithstanding the striking of bal-

¹ Thompson v. Bell, 26 Eng. L. & Eq. 536.

² Thatcher v. The Bank, &c., 5 Sandf. 121.

³ Farmers' v. King, 57 Penn. 202.

(a) A bank may incur liability, by violating its strict obligation in regard to the *redemption of bills*. Thus a person, having a large amount in bills of the bank at Ann Arbor, presented them at the counter of the bank for payment. The mode pursued by the officers of the bank, when a packet of bills was presented, was to take up one at a time, examine it, get from a table the requisite amount of spe-

cie, and pay it, and so proceed until banking hours had expired, and then refuse to make any more redemptions on that day. The bank refused to employ more than one person to count and redeem the money. Held, the conduct of the bank was evasive, and amounted to a refusal to redeem. The People v. Whittemore, 4 Mich. 27.

ances subsequently, where the balances were always more than the amount of the deposit.¹

§ 12. Another frequent ground of claim against banks relates to the drawing of *checks*. (a) And the general rule is, that, in an action against bankers for refusing to pay a trader's check, they having at the time sufficient assets of the trader; the latter may recover substantial damages, without proof of actual damage.²

§ 13. A, in Scotland, being indebted in £460 to B, in England, paid £460 into a Scotch bank, in return for a letter of credit on an English bank, in this form: "Please honor the drafts of B, to the extent of £460, which charge to the bank." A inclosed this letter of credit in a letter to B, which arrived at B's office in B's absence. The only clerk in the office, but who had no authority to manage B's money transactions, opened the letter, took the letter of credit to the English bank, forged a check in B's name for the amount, received payment, and absconded. On B's return, he drew on the English bank for the £460; but his draft was dishonored, and the bank refused payment to him. B then, along with A, sued the Scotch bank in Scotland for repayment of the £460. Held, the bank was liable, unless it could show, that the English bank either actually paid B's draft when called on to do so, or did something which, as between the English bank and B, the English bank was entitled to treat as equivalent to payment.³

§ 14. The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account, known to be such by the defendants, to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff against the bankers, to refund this balance; held, in equity, a person who deals with another, knowing him to have in his hands or under his control moneys belonging to a third person, must not enter into a transaction with him, the effect of which is a fraud on such third person. Decree for repayment of the amount.⁴

¹ Chesapeake v. Swain, 29 Md. 483.

² Rolin v. Steward, 25 Eng. L. & Eq. 341. See Marine, &c. v. Birney, 28 Ill. 90; Chicago, &c. v. Stanford, Ib. 68; Galena, &c. v. Kupfer, Ib. 332; Chicago, &c.

v. Carpenter, Ib. 360; Reynolds v. Kenyon, 43 Barb. 585.

³ Orr v. Union, &c., 29 Eng. L. & Eq. 1.

⁴ Bodenham v. Hoskins, 13 Eng. L. & Eq. 222.

(a) In reference to the liability of one bank to another for negligence relating to a *forged* check, see Leavitt v. Stanton, Hill & Den. 413.

§ 15. The crossing of a check, payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check, that the banker, upon whom the check is drawn, ought not to pay it except through a banker; for, if he does so, and the person presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount. And the banker's duty is the same, where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. But, in an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a check on the defendants, crossed thus, "Bank of England, for account of the Accountant-General." The payee, to whom this check was delivered, struck out the crossing, by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers, and paid it into their bank to the credit of his own account. The check, being presented by them for payment, was paid by the defendants, who charged it to the debit of the plaintiff's account. The payee appropriated the sum so received to his own purposes, and it never was paid to the accountant-general; and the plaintiffs, who were trustees, were obliged to pay the amount themselves. Held, that the check, being thus doubly crossed, afforded no additional evidence of negligence against the defendants.¹

§ 16. We have already (§ 1 *a*) adverted to the liability of a bank for the acts or defaults of its *agents* or *officers*, with more particular reference to the nature of the acts themselves. (*a*) In reference to such liability, as depending upon the express or implied authority of the bank for the act or omission complained of;

¹ Bellamy v. Majoribanks, 8 Eng. L. & Eq. 513.

(*a*) Questions of this nature sometimes arise, in connection with a claim of the bank upon a party indebted to it. Thus, where a note was discounted by a bank, and indorsed by one of its directors who was then liable to the bank to an amount exceeding that authorized by statute; it was held, that the statute was not of that class of prohibitions, which enter into the ordinary contracts of banks

with their customers, and, when violated, render them illegal; its violation might afford ground for an injunction, or a forfeiture of charter, but could not be availed of by a debtor of the bank in defence of a note; as to him, the violation was entirely collateral; it did not enter into or affect his contract. *Richmond Bank v. Robinson*, 42 Me. 589.

it is held that a bank is not responsible for the *frauds* of its servants, unless it has neglected to make the customary examinations of books and papers.¹ And the alleged authority is held to be a question of *fact*, not of *law*. Thus it should not be assumed by the court, as matter of law, that a direction by the cashier of a bank to a sheriff, to sell property levied on, was the act of the bank. Such direction is *evidence* of an interference with the property which should be submitted to the jury, on the trial of an action of trespass against the cashier.² But, to create a liability on the part of the bank, for the fraud of its agent, it is sufficient to show that the bank had appointed the *end*, though not the *means*. Thus where a bank had, through the fraud of its agent, obtained certain assets as security for its liabilities through another bank; held, that, though it was not liable criminally, yet it was liable *civilliter*, and that it could not retain any advantages which had been gained through the agent.³

§ 17. For the negligence of a bank, acting as agent of another bank, in regard to business intrusted to it by a third party, both banks are jointly liable to the principal.⁴

§ 18. By the deed of copartnery of a joint-stock bank, the directors were to submit yearly abstracts of the company's affairs, showing a balance, which abstracts should be binding on the partners, who were to have no right to examine the company's books; but it was to be competent to a majority of partners, at a general meeting, to appoint two of themselves to examine and report on the company's affairs in general. It was also provided, that, if at any time it should be found, on balancing the books, that the losses amounted to a certain sum, the company was to be *ipso facto* dissolved. A, a partner, filed his bill, alleging that the yearly abstracts were false and fraudulent; that the losses already equalled the specified amount; that the directors had misapplied the funds, and, by undue influence, procured a majority of partners to back them; and that the company was insolvent. Held, that the plaintiff's allegations were sufficient to warrant a reference to an accountant to inspect the company's books, and report whether the abstracts were false, and whether the losses equalled the specified amount. Also, that A was not estopped by the deed

¹ Manhattan, &c. v. Lydig, 4 Johns. 377.

² Watson v. Bennett, 12 Barb. 196.

³ Johnston v. S. W. R.R. Bank, 3 Strobl. Eq. 263.

⁴ The Montgomery, &c. v. The Albany, &c., 8 Barb. 396.

from seeking redress in equity; for the deed contemplated a case, where the abstracts were *bond fide*, and not fraudulent. Also, that, the expression, “if on balancing the books a certain loss be found,” being general, the court was justified in taking its own way of ascertaining the fact of the loss, though the deed may contain provisions as to a particular mode of ascertaining it. Also, that “the losses of the company” include such losses as may arise through the fraud of the directors, and for which the directors may be personally liable.¹

§ 19. In trover for certain checks, &c., drawn upon banks in New York, it appeared that the plaintiff was in the habit of sending checks to his agent in that city, to be converted into cash, for the purpose of buying Eastern money. The plaintiff indorsed the checks in question to his agent, and sent them to him for that purpose. The agent indorsed them to the defendants, who received them without notice of the agency, and paid value by passing the amount to the credit of the agent, and certifying checks on their bank for the amount of the credit. The agent misapplied the funds and failed. Held, that the title to the checks passed to the defendants, and therefore that the action would not lie.²

§ 20. It seems that notice received by the cashier, in the course of the duties of his office, concerning matters pertaining to the business of the bank, is notice to the bank.

§ 21. The defendants, a banking company in New York, had funds belonging to the plaintiffs, who were incorporated, and in the exercise of banking powers, in New Jersey. The cashier of the defendants, also one of the managers of the plaintiffs' bank, loaned a portion of these funds, to be repaid upon demand, and notified the plaintiffs' cashier of the loan, by letter, which was duly received. The letter was immediately answered by the plaintiffs' cashier, and the investments were acknowledged by him to be satisfactory. Subsequently, the managers of the New Jersey company met, and took action in relation to their New York affairs, but no objection was made or disapprobation expressed as to the loan. Held, that the plaintiffs were chargeable with notice that the loan had been made, as soon as that notice was received by their cashier, or at least from the time of the meeting of their board of managers; and, as by their silence they had ratified it,

¹ North, &c. v. Collins, 28 Eng. L. & Eq. 7.

² Case v. The Mechanics', &c., 4 Comst. 166.

the defendants were not liable for permitting the funds to be withdrawn from their bank and loaned, even if it was done without authority.¹ (a)

¹ *New Hope, &c. v. Phoenix, &c.*, 3 Conist. 156.

(a) As to the liability of directors and stockholders of a bank, see *Gunkle's, &c.*, 48 Penn. 13. As to liability in case of depreciation, *Marine, &c. v. Chandler*, 27 Ill. 525. For non-payment of bills, *Suffolk, &c. v. Lowell, &c.*, 8 Allen, 355. For unlawful sale of stocks pledged, *Sitgreaves v. Farmers', &c.*, 49 Penn. 359.

CHAPTER XXXVI.

RAILROAD CORPORATIONS.

1. General remarks.
2. General liability of a railroad.
3. Damages caused by the laying out of a railroad; mode of assessing such damages; whether the statutory remedy is exclusive; what damages are or may be included in the assessment.
9. Obstruction, &c., of streets and ways; horse-railroads.
18. Injury to watercourses; overflowing of land, &c.
21. Railroads are *common carriers*; their rights and liabilities as carriers of merchandise; effect of express notices; commencement, termination, and nature and degree of liability; delivery; connecting roads.
30. Rights and liabilities as carriers of passengers; *baggage*; import and effect of *tickets*; payment of fare; right to eject passengers.
40. Duty and liability as to *time*; damages for delay and detention.
41. *Free passengers*.
42. Liability in case of negligence or fault of the party injured; *in pari delicto*.
45. Liability of a railroad for injury done to animals.
47. Liability in case of death.
49. Liability of the company for the acts or neglect of its agents or servants; liability to its own servants; liability in case of lease, &c.
50. Miscellaneous rights and liabilities.

§ 1. RAILROADS constitute a class of corporations, whose rights and liabilities we have occasion in various connections incidentally to notice. (See chapters 3 and 4; *Master, &c., Corporation, Bailment, Negligence, Nuisance, Animals, Common Carrier*.) In consequence of their great multiplication and constant activity; their necessary interference, in the act of construction, with the rights of property; the numerous and complicated trusts assumed by them; the large number and various offices of their agents and servants; and the dangers, many of them of an entirely novel character, incident to their mode of operation: (a) — these corporations give occasion to very frequent judicial investigations, the results of which are found embodied in numerous English and American decisions. So far as questions of this nature are determinable by the general rules of law heretofore adopted in analogous cases, more especially the general rules pertaining to *common carriers*, which are substantially the same in transportation by land and by water, by individuals and by corporations, we refer the reader to what has been and will be said in other portions of the present work. That portion of the law more exclusively ap-

(a) "The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage." Per Tindal, C. J., *Piggot v. Eastern, &c.*, 3 Man., Gr & Sc. 240.

See, also, the remarks of Mr. Chief

Justice Shaw, in *Shaw v. Boston, &c.*, 8 Gray, 66.

It is held that the liabilities of railroads for torts are to be determined upon the same principles as those of private persons. *Stucke v. Milwaukee, &c.*, 9 Wis. 202.

plicable to the subject in question, so far as it is settled by the decisions, we proceed summarily to state. It will be seen, however, that there are few subjects upon which the cases are more conflicting. New combinations of facts are constantly occurring, which call for modifications of principles previously supposed to be settled; and the prevailing tendency of the courts seems to be, to leave questions to the jury as questions of fact, instead of deciding them as matters of law, and thus building up a system of settled and authoritative rules and precedents. Moreover, railroads are a most prolific subject of express statutory regulation, either in their respective special charters, or by general legislation. Hence arises, in the law relating to them, the want of uniformity necessarily incident to the diverse action of numerous legislative bodies, which, though aiming at the same results, of the public safety and convenience, adopt very various means for their accomplishment. (a)

§ 2. The general principle is laid down, that a railroad company is responsible in damages, for doing what its charter does not authorize, or improperly doing what it does authorize.¹ (b)

¹ Turner v. Sheffield, &c., 10 M. & W. 425.

(a) It would be difficult to overstate the number and magnitude of the new questions in law which have been initiated by the system of railroads now so universally prevalent. Of course, the actual cases brought before the courts are proportionally numerous; precluding the citation, much more the briefest abstract, in a work like the present, of all or even a large portion of those cases. It may be useful to suggest the leading topics more or less connected with the general subject of torts, which are now constantly being brought up for adjudication in suits to which railroad corporations are parties. The prolific subject of *negligence*, — whether on the part of defendant or plaintiff or both, — involving the nice and subtle points of causation proximate and remote, contributory fault, and the respective provinces of judge and jury, is more frequently discussed with reference to railroads than in all other forms put together. The relation of *master and servant* comes up in new aspects, but still to be illustrated by old analogies. In particular, the liability of a master to one servant for injury caused by the act or neglect of another, has never before been so critically investigated as in connection with railroads. From the same source have sprung up the questions relating to

the respective responsibility of distinct railroads, over which the same freight is successively transported; the rights and duties of towns with reference to high-ways with which railroads come in juxtaposition; the significance and legal effect of tickets and checks; new points in the contract or trust of bailment and common carriers, already so abounding in the nicest questions, — points relating alike to the transportation of freight and of passengers, and many of them, more particularly in the case of passengers, entirely novel; injuries to animals, and the respective rights and duties of a railroad and an adjoining land-owner as to fences; and injuries resulting in death. In addition to all these subjects, though perhaps more directly coming under the head of *contracts* than of *torts*, are the familiar cases of railroad subscriptions, bonds, mortgages, and the constitutional questions of which they are so continually suggestive. And the mere nomenclature of railroads — depots, platforms, switches, conductors, engineers, and brakemen — is suggestive of numberless novel and puzzling questions, which are yearly contributing to make this one of the most copious titles in the law.

(b) A railroad is bound, in the conduct of its train, to use such care and caution

And it is held that railroads must exercise the utmost care and diligence in the enjoyment of their own privileges, to avoid doing injuries to others.¹

§ 3. Except by virtue of express statutes, and unless chargeable with want of skill or prudence in making or working their roads, railroad companies are held not liable for necessary consequential damages to persons, no part of whose land is taken by them.² But fencing rendered necessary by the construction and use of a railroad over land is a consequential damage, for which the owner is entitled to compensation, subject to a set-off of consequential advantages.³ The English statute (8 & 9 Vict. c. 8, § 68) makes railroads liable to the owners of all lands *injuriously affected* thereby. And, under this statute, a railroad is liable for any act which would be a nuisance if done by an individual, or for which an action might be maintained, without the protection of the special charter.⁴

¹ *Gorman v. Pacific, &c.*, 26 Mis. 441.

² *Monongahela, &c. v. Coons*, 6 W. & S. 101; *Kadcliff v. The Mayor, &c.*, 4 Comst. 195; *Case of the Philadelphia, &c.*, 6 Whart. 25; *Richardson v. Vermont, &c.*, 25 Vt. 465; *Henry v. Pittsburg, &c.*,

8 W. & S. 85. See *Pixley v. Clark*, 35 N. Y. 520.

³ *Louisville v. Glazebrook*, 1 Bush, 325.

⁴ *Glover v. North, &c.*, 5 Eng. L. & Eq. 335; *Hatch v. Vermont, &c.*, 25 Vt. 49.

to prevent injury, as prudent and discreet persons would use and exercise under the circumstances. *Northern v. State*, 29 Md. 420; *Tennessee v. Adams*, 3 Head, 596; *Bannon v. Baltimore*, 24 Md. 108.

Where the cause of a railway accident and injury to the plaintiff was a broken rail, that threw the car in which he was riding off the track; held, a question for the jury whether the rail was not broken before the train came upon it. *McPadden v. New York*, 47 Barb. 247.

Action for an injury caused by running over a cow grazing close to the track, in a position that it was difficult to escape from. It was daylight, and the place could be seen at a long distance by the engineer; but he did not slacken his speed. Held, error to nonsuit the plaintiff. *Brown v. New York*, 34 N. Y. 404.

One railroad, granting the use of its road to another, is responsible for accidents caused to its own passengers by the negligence of the trains of the latter. *Railroad v. Barrow*, 5 Wall. 90.

The complaint, in an action against a railroad, for injuries sustained by a child of tender years from a passing locomotive, charged that the defendant, in a "careless and wanton" manner, ran the locomotive over, &c. Held, the word "wanton" did not mean "wilful," and added no force to the charge that the act was done in

a "careless" manner. *Lafayette v. Hoffman*, 28 Ind. 287.

A railroad is only obliged to use such reasonable care and diligence as ordinary prudence would suggest and require, having regard to its business, and its liability to collision with others, in the passage of its locomotive through the thoroughfares of a city. *Baltimore v. State*, 29 Md. 252.

A railroad is bound to ordinary care to a shipper of freight during the loading. *Stinson v. N. Y., &c.*, 32 N. Y. (5 Tiffa.) 333.

That a railroad cannot be restricted by municipal authority under a statute concerning nuisances, see *State v. Jersey, &c.*, 5 Dutch. 170. See also *New, &c. v. Higman*, 18 Ind. 77.

A railroad, authorized by law, and properly operated, is not a nuisance by reason of the smoke, &c., from its locomotives. 10 Ohio, N. S. 624.

A railroad company built a road through a street, constructing embankments which made the approach to the plaintiff's house less convenient, and prevented the surface-water from draining off. The work was approved by the city engineer. Held, the plaintiff could recover damages. *Parrot v. Cincinnati, &c.*, 10 Ohio, N. S. 624.

§ 4. The charters of railroad corporations, like those of other companies, the purpose of whose incorporation requires the taking of land owned by individuals, provide of course for a suitable compensation for such land, and also the mode in which it shall be assessed and collected; usually by proceedings in form more *amicable* than an ordinary suit, and through a *committee, commissioners, or a special jury*. (a) Whether such statute remedy is

See *Brock v. Connecticut, &c.*, 35 Vt. 273; *Davis v. Russell*, 47 Me. 443; *M'Aulay v. Western, &c.*, 33 Vt. 311; *Cleveland, &c. v. Prentice*, 13 Ohio St. 373; *Pinneo v. Lackawanna, &c.*, 43 Penn. 361; *Pennsylvania, &c. v. Schwarzenberger*, 45 Penn. 208; *Harvey v. Lackawanna, &c.*, 47 Penn. 428; *East, &c. v. Hottenstine*, 47 Penn.

28; *Wadhams v. Lackawanna, &c.*, 42 Penn. 303; *Central, &c. v. Hetfield*, 5 Dutch. 206; *Hetfield v. Central, &c.*, Ib. 571; *Plymouth, &c. v. Colwell*, 39 Penn. 337; *Wells v. Somerset, &c.*, 47 Me. 345; *M'Aulay v. Western, &c.*, 33 Vt. 311; *Grand, &c. v. County, &c.*, 14 Gray, 553.

(a) See *Junction v. Boyd*, 1 Penn. Leg. Gaz. 107. The constitutional provisions as to taking land for railroads are held equally applicable whether to steam or horse roads. *Craig v. Rochester, &c.*, 39 Barb. 494. See *Hobart v. Milwaukee*, 27 Wis. 194. Also, for an important case on this subject, *People v. Kerr*, 37 Barb. 357.

That a railroad line was located through a lot, so as to greatly injure the value of the land not taken, is no trespass, it not appearing that the road could have been so well located in any other way. *Cleveland, &c., Co. v. Stackhouse*, 10 Ohio, N. S. 567.

No limit of approach towards buildings and bridges being fixed in the charter of a railroad, they have the right to locate their road and stations upon such route and at such points as, in the judgment of the directors, would be beneficial to the corporation and the public. *Frankford v. Philadelphia*, 54 Penn. 345.

A railroad seeking to divest a citizen of his constitutional rights, if they set up a waiver, must produce, if not written, full, distinct, and unequivocal proof of the waiver. *Unangst's*, 55 Penn. 128.

To entitle a railroad to a right of way, the constitution requires payment of the value of the use, without regard to consequential advantages. *Louisville v. Glazebrook*, 1 Bush, 325.

See *Peddicord v. Baltimore*, 34 Md. 463; *Elizabethtown v. Helm*, 8 Bush, 681; *Peterson v. Ferreby*, 30 Iowa, 327.

A railroad, authorized to acquire lands, must make compensation before constructing the road. *Hinchman v. Patereson*, 2 Green (N. J.), 75.

A railroad having run a line of their road near the plaintiff's house and barn, and over his spring, he said to the presi-

dent, that, if they would locate the road farther up, he would give them the land. The president said they would "try to accommodate." Held, this did not prove a grant of a right of way, or a release of damages. *East v. Schollenberger*, 54 Penn. 144.

Where a railroad enter upon lands of an individual, for the use of their road, without his consent, and without first having assessed and tendered the damages; he may recover possession. *Graham v. Columbus*, 27 Ind. 260.

One over whose land a railroad has been located, and to whom damages have been awarded, may demand prompt payment; but the corporation may avoid the liability, by at once abandoning the location. *Hayes v. Cincinnati*, 17 Ohio 110.

A railway, having notified a leaseholder that her premises were wanted for their road, subsequently arranged with her tenant, and received from him the key; whereupon she duly notified them of her interest and to summon a jury, which they neglected to do. Held, the company were liable for the amount demanded, as having actually taken the premises. *Barker v. Metropolitan*, 17 C. B. N. S. 785.

See *Boston v. Greenbush*, 5 Lans. 461; *Shipley v. Baltimore*, 34 Md. 336; *Strathecker v. Alabama*, 42 Geo. 509; *Alabama v. Burkett*, 46 Ala. 569; *Chicago v. Sanford*, 23 Mich. 418; *Carli v. Stillwater*, 16 Minn. 260; *Eaton v. European*, 59 Me. 520; *East v. Schollenberger*, 54 Penn. 144; *Philadelphia v. Williams*, 54 Penn. 103; *Unangst's*, 55 Penn. 128.

Under (Mis.) Gen. Sts., a published notice to the owner of land, that application would be made to a judge of the circuit court, at a certain time and place, to appoint commissioners to view and assess

exclusive, is a point upon which the authorities are somewhat conflicting.¹ But it is well settled, that an action at common law lies for appropriating land in violation of the requisitions of the char-

¹ See *Redfield on Railw.* 173; *Mason v. Kennebec, &c.*, 31 Me. 215; *Regina v. Eastern, &c.*, 3 Eng. Railw. Cas. 466; *Knorr v. Germantown, &c.*, 5 Whart. 256; *Watkins v. Great, &c.*, 6 Eng. L. & Eq. 179; *White v. Boston, &c.*, 6 Cush. 420.

And contra, *Kennett, &c. v. Witherington*, 11 Eng. Law & Eq. 472; *Carr v. Georgia, &c.*, 1 Kelly, 524; 1 Am. Railw. Cas. 166 *et seq.*; *Ambergate, &c. v. Midland, &c.*, 22 Eng. L. & Eq. 289; *Kemp v. S. E. L. R.* 7 Ch. 364.

the damages which he might sustain in consequence of the establishment and maintenance of a railroad over his land, and particularly setting out and describing the land, is sufficient. *Quincy v. Taylor*, 43 Mis. 35.

The (Cal.) Practice Act, in relation to new trials, has no application to a motion to set aside the report of the commissioners to assess damages for lands condemned for railroad purposes. *Central v. Pearson*, 35 Cal. 247; *Western v. Reed*, Ib. 621.

The record of such commissioners should show strict compliance with the statute and the rules of law applicable to the several questions which may arise in the investigation. *Ibid.*

The report of "their proceedings in the premises" should show, among other things, that they met at the time and place designated in the order of the court; that they were sworn before entering upon the discharge of their duties; that they viewed in person the land sought to be condemned; that, at times and places of which the several parties in interest had notice, they heard the allegations and proofs, and to that end issued subpoenas for all desired witnesses. It should also contain minutes of the testimony, and the rulings upon all points made as to testimony; and, generally, all matters which are necessary to show the rules or principles by which the commissioners were governed. *Ibid.*

The "review" of the court is intended to be founded upon the report of the commissioners, so far as all matters which should there be stated are concerned, and not upon bills of exceptions or statements in the sense of the Practice Act in relation to new trials. *Ibid.*

If the report does not show fully what their proceedings were, it should be set aside, or sent back to them for amendment. *Ibid.*

The court may compel the commissioners to amend their report. *Ibid.*

If "good cause," within the meaning of § 31, exists, for setting aside the report, which does not appear on its face, such as fraud or misconduct on the part of the

commissioners or others; such cause may be shown by affidavits, or in any other legal mode which the court may prescribe. *Ibid.*

A bill of exceptions to the report, signed by the commissioners after the trial, should be considered a part of the report, as an amendment. *Ibid.*

See *Reed v. Louisville*, 8 Bush, 69; *New Orleans v. Frederic*, 46 Miss. 1; *Watkins v. N. Y.*, 47 N. Y. 157.

Where a railroad company are incorporated expressly for the use and benefit of that section of the State where the road is located; it will be assumed that the grant of authority to condemn the land necessary for a road-bed was a rightful exercise of legislative authority. *Dietrich v. Murdock*, 42 Mis. 279.

Where, seven or eight years after a railroad was located and constructed, the owner of land over which the road passed complained of irregularities in condemning the land; held, it would be assumed that the occupation of the land was assented to by him, and the company would be protected in the enjoyment of property used in connection with their road, and, if compelled to leave the premises, would be permitted to remove such property. *Ibid.*

A land-owner cannot maintain an action against a railroad for breaking and entering his close, because the company have elsewhere deviated from the limits prescribed by their charter. *Newton v. Agricultural*, 15 Gray, 27.

Where a railroad charter authorized the company to "enter upon, take possession of, and use all and singular any lands, streams, and materials of every kind for the location," &c., of bridges, stations, &c., "necessary for the construction, completing," &c., of the road, and provided that "all such lands, materials, and privileges belonging to the State are hereby granted to said corporation for said purposes;" held, the grant did not include the ground used by the State for the education of the blind, although adjoining the road and very convenient for its use. *St. Louis v. Blind*, 43 Ill. 303.

ter; for omission of a statutory duty; or for want of care or skill in exercising the legal rights of the corporation.¹ And an action is held to lie for damage done in the construction of a railroad, though no negligence is proved.² But a subsequent purchaser of the land cannot maintain an action.³

§ 5. The further question has been raised, what damages are to be considered as included in the statutory assessment, when such assessment is made, and therefore cannot be made the subject of a subsequent action at common law. Upon this subject, it is remarked in a recent case, "An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute. Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages."⁴

§ 6. In conformity with these views, the owner of land damaged by the blasting of rocks, in the construction of a railway, can maintain no action therefor, after being compensated for the land of which such rocks made a part. The damage is held to be included in such compensation.⁵ So a railroad is not liable to an action, for entering upon adjoining lands, and occupying them with temporary dwellings, stables, and blacksmith-shops, if necessary for its purposes.⁶ So, although land damages are reduced by

¹ *Watkins v. Great, &c.*, 6 Eng. L. & Eq. 179; *Dean v. Sullivan, &c.*, 2 Fost 316; *Furniss v. Hudson, &c.*, 5 Sandf. 551; *Turner v. Sheffield, &c.*, 10 M. & W. 425.

² *New, &c. v. Huff*, 19 Ind. 315.

³ *Central, &c. v. Hetfield*, 5 Dutch. 206.

⁴ Per Shaw, C. J., *Dodge v. Co. Commis.*, 3 Met. 383.

⁵ *Dearborn v. Boston, &c.*, 4 Fost. 179; *Sabin v. Vermont, &c.*, 25 Vt. 363; *Dodge v. Co. Commis.*, 3 Met. 380; *Brown v. Providence, &c.*, 5 Gray, 35.

⁶ *Lauderbrun v. Duffy*, 2 Barr, 398.

false representations of the company's agents as to the future mode of constructing the road; the land-owner still cannot recover damages beyond the appraisal, if the road has been built prudently and properly. All negotiations are merged in the adjudication.¹

§ 7. Damages cannot be allowed by commissioners to a turn-pike for a diminution of its business by a railroad on the same line of travel.² Nor, in general, for consequential and prospective damages.³ So exposure of remaining land to fires, by engines on a railroad, is held not a proper element of damages in an appraisal.⁴

§ 8. But, on the other hand, the appraisal of land-damages is held a bar to claims for injuries by fire, and obstruction of access to buildings by engines, exposing persons or cattle to injury.⁵ So, although such damages were unknown to the appraisers, or not susceptible of anticipation, at the time.⁶ But the excavation of an adjoining lot, and thus weakening the foundations of a house, and erecting an embankment in the highway, so as to darken lights and render a house unfit for use; do not constitute a *taking of land* (compensated by appraisement), but are injuries for which an action may be maintained.⁷ (*ā*)

¹ Butman v. Vermont, &c., 1 Wms. 500.

² Troy, &c. v. Northern, &c., 16 Barb. 100.

³ Albany, &c. v. Lansing, 16 Barb. 68.

⁴ Sunbury, &c. v. Hummell, 27 Penn. 99 (two judges dissenting). See Railroad Co. v. Yeiser, 8 Barr, 366; Lehigh, &c. v. Lazarus, 28 Penn. 203.

⁵ Railroad Co. v. Yeiser, 8 Barr, 366; Mason v. Kennebec, &c., 31 Me. 215; Aldrich v. Cheshire, &c., 1 Fost. 359.

⁶ 1 Fost. 359.

⁷ Bradley v. New York, &c., 21 Conn. 294. See Wyrley, &c. v. Bradley, 7 E. 368.

(a) In a proceeding to assess damages done by the construction of a railroad, it is not error to refuse to instruct the jury that they must state in detail the items which should constitute their verdict. Western v. Hill, 56 Penn. 460.

The value of the land appropriated, and any naturally resulting injury to the residue of the land from which it is taken, such as cutting the fields into an ill shape, destroying the convenience of water for stock, and rendering an additional amount of fencing necessary, are all proper items of damages. Also, it seems, the taking from the residue earth wherewith to construct the road-bed. White v. McClure, 29 Ind. 536.

In a proceeding under the (Ind.) general railroad law for an assessment of damages for taking of land, evidence, that the farm is worth as much or more, with the road than without it, is inadmissible. No deduction is to be made for any benefit. Ibid.

Stone, excavated in constructing a branch railroad through a man's land, under a permissive license from him to construct and use the track thereon, and hold the same so long as it shall be used for railroad purposes, remains his property, and, if not used in the construction of the branch track, cannot be removed and devoted to other purposes without his permission. Chapin v. Sullivan, &c., 39 N. H. 564. See O'Neil v. Harkins, 8 Bush, 650.

Where a statute exempts a *dwelling-house* from liability to be taken by a railroad company; the garden, orchard, and curtilage are not exempted. Wells v. Somerset, &c., 47 Me. 345.

In an inquest to recover damages done to land by a railroad, the plaintiff's title is a proper subject of inquiry; and, upon exceptions, the decision of the jury will be presumed correct. Directors, &c. v. Railroad, 7 W. & S. 236.

Where a railroad is authorized only to

§ 9. The necessary interference of railroads with *streets* or *highways* gives rise to an important and difficult class of questions for legislative and judicial regulation and settlement.¹

§ 10. A railroad track may lawfully be allowed *upon a street*; and adjoining proprietors cannot maintain an action for the inconvenience caused to them by the work of excavation and tunneling.² (a)

§ 11. Where the grade of a street was altered by a railroad by consent of the government of the city, who, as required by statute, had assessed damages to parties injured; held, no action would lie against the railroad.³ (b)

¹ See *Carpenter v. Central*, 11 Abb. Pr. N. S. 416; *Klein v. Crescent*, 23 La. Ann. 729; *Baxter v. Spuyten*, 61 Barb. 428; *Reed v. Louisville*, 8 Bush, 69; *Baltimore v. Union*, 35 Md. 224; *Peddicord v. Baltimore*, 34 Md. 463; *State v. London*, 3 Head, 263; *Louisville v. State*, Ib. 523; *Boston v. Old*, 14 Allen, 444; *South v. Columbia*, 18 Rich. 339; *Tennessee v. Adams*, 3 Head, 596; *Snyder v. Penn.*, 55 Penn. 340; *Veazie v. Mayo*, 49 Me. 156; 45 Ib. 560; *Veazie v. Penobscot*, &c., 49 Me. 119; *Newcastle, &c. v. North, &c.*,

5 Hurl. & Nor. 160; *Com. v. Haverhill*, 7 Allen, 523; *Warren, &c. v. State*, 5 Dutch. 353; *North, &c. v. Dale*, 8 Ell. & Bl. 836; *Com. v. Capp*, 48 Penn. 53; *Com. v. Hartford, &c.*, 14 Gray, 379; *Albany, &c. v. Brownell*, 24 N. Y. (10 Smith) 345.

² *Plant v. Long Island, &c.*, 10 Barb. 26.

³ *Chapman v. Albany, &c.*, 10 Barb. 360; *Adams v. Saratoga, &c.*, 11 Ib. 414; *Wolfe v. Covington, &c.*, 15 B. Monr. 404; 10 N. Y. 328.

"enter upon any land, to survey, lay down, and construct its road;" "to locate and construct branch roads from the main road to any town or places in the several counties through which the said road may pass;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road;" and such company has located, and is engaged in the construction of its permanent main road along the north side of a town: it is not authorized to appropriate a temporary right of way, for the term of three years, along the south side, to be used as a substitute for the main track while the same is in course of construction along the north side. *Currier v. Marietta, &c.*, 11 Ohio, N. S. 228.

(a) See *Tobin v. Portland*, 59 Me. 183; *Potter v. Bunnell*, 20 Ohio St. 150.

In Massachusetts, a railroad company has no right to use a highway as a part of its freight yard; but it has a right to pass and repass over a highway in making up its trains and shifting its cars, to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Gahagan v. Boston, &c.*, 1 Allen, 187.

(b) A city, within the lawful exercise

of its authority, allowing railroad tracks in the streets, is not liable for damages. *Murphy v. Chicago*, 29 Ill. 279.

After a plank-road had been constructed, a railroad was built, crossing, and running almost parallel with it, for a quarter of a mile, and so near, as was alleged, as to render travelling on the plank-road dangerous, owing to the fright of horses, whereby the franchise of the plank-road company was depreciated in value. The railroad had been constructed with care, skill, and good faith. Held, the plank-road company, having had their damages assessed by proceedings under the statute, in which proceedings the question of location was examinable, could not afterwards maintain an action. *Lafayette, &c. v. New Albany, &c.*, 13 Ind. 90. But see *Graham v. Columbus*, 27 Ind. 260.

The loss of customers by a baker, caused by the stopping up of a thoroughfare by a railway, is a proper subject of compensation under § 68 of 8 & 9 Vict. c. 18. *Cameron v. Charing*, 16 C. B. N. S. 430.

Erecting a platform or depot for passengers, within the limits of a public street, is a taking of the land occupied for another and different purpose from that for which it was taken when a street was laid out over it; and the owner of

§ 11 *a*. Where a crossing renders the highway dangerous or inconvenient, the railroad is responsible, though the town may also be liable.¹ (*a*)

¹ *Gillett v. Western, &c.*, 8 Allen, 560. See chap. 37, § 19.

the land is entitled to additional compensation for the increased burden upon it. *Higbee v. Camden*, 4 Green (N. J.), 276.

A complaint in an action against a railroad, which alleges that it "wrongfully and without authority filled said First Street, immediately in front of the plaintiff's lots, with stone and dirt, to the height of about eight feet above the level of said lots, and above the grade of said First Street, whereby access to said lots is rendered more difficult, and plaintiff is unable to rent the said lots as profitably as he otherwise might have done, to plaintiff's damage," &c., states a good cause of action. *Farrant v. First*, 13 Minn. 311; *Gray v. Same*, *Id.* 315.

A railroad, unnecessarily obstructing a street with cars, is liable to the penalty prescribed in a town ordinance, if "any person shall put, in any street, dirt, &c., or obstructions of any kind." *Illinois v. Galena*, 40 Ill. 344.

Where, by the building of a railway, and under the sanction of an act of Parliament, a highway connecting different pieces of A's land is discontinued; A is entitled to compensation under 8 & 9 Vict. c. 18. Damage from being obliged to cross a railroad at a level is *common* and is therefore no subject of compensation. *Wood v. Stourbridge*, 16 C. B. N. S. 222.

A railway obstructed a highway with their line, and thus rendered certain buildings less easy of access, and diminished the number of passers-by, and consequently of customers to the shops. Held, under 8 & 9 Vict. c. 18, and under § 6 of 8 & 9 Vict. c. 20, which provide for compensation to parties interested in lands "injuriously affected" by the construction of a railroad, an action lay by the owner of such buildings against the railway; and, the buildings being in process of construction, damages could be awarded for injuries that would arise, estimating them to have as much permanency as the railway. *Chamberlain v. West*, 2 B. & S. 605, 617.

(*a*) A railroad company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was twelve rods wide, with two travelled paths, one on each side, and an open common between. The company, being required by its charter to restore any highway intersected, so as

not to impair its usefulness, put the two travelled tracts in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths, they constructed a culvert under the timbers of the track, to let the water accumulating from rains pass through, which was left uncovered. The plaintiff, walking across the street upon the railroad track, when the culvert was filled with snow and could not be seen, fell into it, and was injured. Held, the railroad was liable. *Judson v. New York, &c.*, 29 Conn. 434.

Where, by a city charter, its authorities are vested with exclusive control over the streets, and grant permission to locate railway tracks along a street; the owners or occupants of property fronting such street cannot enjoin the laying of such tracks, nor recover any damage or compensation. *Moses v. Pittsburg, &c.*, 21 Ill. 516.

The fee-simple title to the streets of the city of Chicago, as in other cities, is vested in the municipal corporation. *Ibid.*

Steam, as a motive power, may be used, along the streets of a city, by proper permission. *Ibid.*

The city of Milwaukee, in its corporate capacity, has not such an interest or property in the streets and public squares, as to allow it to maintain a bill for an injunction to restrain the laying down of rails therein. The abuttors own the fee to the centre of the streets, and, though the certain use thereof has been dedicated to the public, that dedication cannot pass the property therein. *Milwaukee v. Milwaukee, &c.*, 7 Wis. 85.

Where a city railroad company, by authority of the city, and with the sanction of the legislature, has constructed a railroad, and is running cars thereon, through the streets; the public have the right to drive upon and across their track, but not so as to interfere with the proper business of the company. *Wilbrand v. Eighth, &c.*, 3 Bosw. 314.

The company is entitled to the unrestricted use of its rails for the progress of its cars, within that limit of speed which the law allows them, and the driver of any other vehicle, being unnecessarily on the track, is bound to exercise greater care than if upon the common pavement, to avoid collision, and to see that an approaching car is not impeded; and if,

§ 11 *b*. A railroad is responsible, without affirmative proof of negligence, for injury caused, without fault of the person injured, by a running switch over the crossing of the track on a highway.¹

§ 11 *c*. But the rules, regulating the distance from each other at which trains shall run, are solely intended to protect the property of the company, and for the safety of their employees and passengers. In a suit for injury at a crossing not public, negligence in the company is not to be inferred from the proximity of their trains. And no action can be maintained, without proof of negligence, for injury to a child, about five years of age, who, in crossing the track between a coal train and an engine and tender closely following, was struck by the engine.² Nor does an action lie for injury caused by laying a track and running a train across a street in a city, without positive proof of negligence. In reference to speed, it is generally a question of fact in each case, whether the rate was excessive or dangerous, depending somewhat upon the safeguards against accident. But if the rate was the usual one, no such question arises.³

§ 12. Where a street is taken by a railroad, the remedy of an abutter is not by statute, but the ordinary one at law, to recover for a consequential injury. And the lot and street adjoining, as to the owner of the former, constitute but one piece of property; an injury to the latter is an injury to the former, and to the whole property.⁴

§ 13. In Vermont, a land-owner may recover damages for using

¹ *Brown v. New York, &c.*, 32 N. Y. (5 Tiffa.) 597.

² *Philadelphia, &c. v. Spearen*, 47 Penn. 300.

³ *Wilds v. The Hudson, &c.*, 29 N. Y. (2 Tiffa.) 315.

⁴ *Protzman v. Indianapolis, &c.*, 9 Ind. 467.

through negligence or wilfulness in this respect, a collision ensues, he should not have damages against the company, even though the servants of the latter are also in fault. *Ibid*. See § 16.

But a city railroad company or their employees have no right to regulate or prohibit travel on a public street where their track is laid, or any part of it; and, if the employees forcibly run a horse and wagon from the track, the company is liable for all damages. *Fettrich v. Dickenson*, 22 How. (N. Y.) 241

The proviso to § 14 of the charter of the Connecticut and Passumpsic River Railroad Company gave the land-owner no right to cross the track, which could not be controlled and regulated by subsequent general legislation, and Compiled Statutes, c. 26, § 43, had the effect to

regulate and define the right of crossing, conferred by that proviso. *Connecticut, &c. v. Holton*, 32 Vt. 43.

Under this section (43), neither the railway company nor the adjacent land-owner have the right to determine separately, and without the consent of the other party, the number, character, and location of the farm crossings. *Ibid*.

And the land-owner has no right to build a crossing at any other place than that fixed by the commissioners, or agreed upon by the parties, nor to cross the track at any other point. *Ibid*.

That a (steam) railroad cannot be made *longitudinally* along a highway, without the most express authority; see the forcible remarks of Mr. Chief Justice Shaw, in *Inhabitants, &c. v. Connecticut, &c.*, 4 Cush. 71.

land, adjoining the land taken, for a cart-way, where six rods were allowed to be taken, by the company, throughout the line of the road, which would give ample space for cart-ways upon the land taken.¹

§ 14. A statute, requiring railroads to construct *under-passes* for the accommodation of the public travel on ways, does not apply, unless such way has been laid out agreeably to statute law, or been used by the public for at least twenty years.²

§ 15. Where the statute provides for an action for obstructing the safe and convenient use of *a private way* in the construction or use of a railroad; the company are liable, though the road be not made or managed illegally or improperly.³ But the question of obstruction is for the jury.⁴

§ 16. *Horse-railroads*, being usually constructed upon and along public highways, must, of course, more frequently than any other class, occasion interference with the privileges incident to such highways. (a) While they constitute, in and about large towns

¹ Sabin v. Vermont, &c., 25 Vt. 363.

² Northumberland v. Atlantic, &c., 35 N. H. 574.

³ Concord, &c. v. Greely, 3 Fost. 237.

See Clark v. The Boston, &c., 4 Ib. 114;

M'Laughlin v. Charlotte, &c., 5 Rich. 583.

⁴ Greenwood v. Wilton, &c., 3 Fost. 261.

(a) See p. 301, n.; Hobart v. Milwaukee, 27 Wis. 194; Schierhold v. North, 40 Cal. 447; Chicago v. Stumps, 55 Ill. 367; Isaacs v. Third, 47 N. Y. 122; Cincinnati, &c. v. Cummins, 14 Ohio St. 523; People v. Kerr, 37 Barb. 357; Brooklyn, &c. v. Coney, &c., 35 Barb. 364; Com. v. Temple, 14 Gray, 69; Plymouth, &c. v. Colwell, 39 Penn. 337. In New York, it seems, a city cannot permit horse-railroads to use the streets, without special authority from the legislature. After the legislature has given the city this power, the city may grant the right, on such terms and conditions as to the use of the track and streets as it may think proper. Thus the charter of the New York and Harlem R.R. Co., of 1831, provided, that the road should not be constructed in the streets without permission from the city, which the same charter authorized to grant permission, and the right was reserved to the city to regulate the use, &c. The city authorized the company to lay the track, with the proviso that the city should have the power to regulate the manner of use, and the kind of propelling power, and that the permission should not be binding, until the company covenanted under seal to perform the conditions. They did so covenant; and afterwards the city prohibited the use of steam in the streets. Held, the prohibition did not violate the char-

ter of the company; the permission to lay the track did not take away the power to make the prohibition; the city could not, without express authority from the legislature, make any contract which would deprive it of control over the streets; the company's agreement was a restriction upon and not a transfer of their power or franchise, and therefore was binding; and the above ordinance, prohibiting the use of steam, is one which it is properly the duty of the police commissioners to enforce; it relates either to police or health, if not to both. New York, &c. v. New York, 1 Hilt. 562.

In Louisiana, the streets of an incorporated city are destined for public use, but not for a particular mode of public use. The city of New Orleans has the right to sell the right of way in the streets to private individuals for a specified time, with a privilege of laying rails and running horse-cars over them, according to a tariff to be fixed by the common council. This right is conferred upon the city by the act incorporating it, and upon all incorporated cities or towns in the State by the act of 1856, relative to the organization of the corporations for works of public improvement. Brown v. Duplessis, 14 La. Ann. 842.

In Indiana, establishing a railroad in the street of a city is not a taking of private property, within a statute relating

and cities, one of the greatest of modern conveniences; it must be admitted, that, to reconcile their indefinite multiplication with the safe and comfortable use of the streets over which they are laid out, is likely to be a very difficult problem of State legislation and municipal regulation. A very recent case in Massachusetts presents an interesting view of the relative rights and duties of a horse-railroad corporation, claiming under its charter an exclusive appropriation of a portion of the highway, and of the citizens at large, justifying an obstruction of the railroad, by virtue of an alleged paramount right to use the whole or any part of such highway for ordinary and general travel. The case derives additional interest from the fact, that it gave occasion to one of the most recent recorded judgments of the late chief justice, who has just withdrawn from the bench, after contributing to the jurisprudence of his State and of the age a collection of judicial opinions, which, tried by the compound test of number and value, has rarely been excelled in any country or at any period.

§ 17. Indictment on § 5 of the statute of 1856, chapter 302, entitled "An Act to incorporate the Malden and Melrose Railroad Company," which provided as follows: "If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or may be imprisoned in the common jail for a period not exceeding three months." At the trial in the Court of Common Pleas, it appeared from the evidence on the part of the Commonwealth, that the defendant was driving his heavily loaded wagon from Charlestown to Boston in a public street, with one wheel in the track of the Middlesex Railroad, when one of the cars of the Malden and Melrose Railroad came up behind

to the assessment of damages for such taking. The remedy, if any, is at common law. *New, &c. v. O'Daily*, 12 Ind. 551.

A horse-railroad company cannot complain that another railroad track is allowed to cross theirs; the passage of its cars is not thereby impeded. *Brooklyn, &c. v. Brooklyn, &c.*, 33 Barb. 420.

The conductor of a street-railway car may exclude or expel a passenger, when his conduct or condition is such as to render it reasonably certain that he will occasion discomfort or annoyance to other passengers. *Vinton v. Middlesex*, 11 Allen, 304.

In an action against a street railway for the loss of merchandise delivered to a conductor for transportation on the platform of a car, for which money was paid to the conductor, the testimony of two other persons that they had paid money at other times to the conductors for the like transportation, with the knowledge of the superintendent, is competent to show, and sufficient to warrant a jury in finding, that the defendants had assumed the business of common carriers of merchandise on their cars. *Levi v. Lynn*, 11 Allen, 300.

him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the horse-cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would please to remove his team from the track. The defendant did not, but continued upon it at the same rate of speed several hundred feet, and then turned off. It also appeared, from the same testimony, that it was usual for those in charge of vehicles like that of the defendant to drive them with one wheel in the track, and that they could be drawn much more easily in that place than in any other part of the street. There was no evidence that the defendant got upon the track, in the first instance, with the intention of obstructing the cars, or that he changed his rate of speed on the approach of the cars, or that he used the street, or did any act in any other than the usual manner. There was no other evidence than this bearing upon the question of malice. As bearing upon the question of intention, the defendant offered to show that it is not the custom for those in charge of vehicles to turn out when a car comes up behind them, until it suits their convenience. The evidence was objected to, and ruled out. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street the most convenient to him in the ordinary way, knowing that the car would be obstructed by such use. The defendant also prayed for the following instructions: 1. If the jury find that the defendant was using the highway in the ordinary way, they must find for the defendant, without reference to the motive of his act. 2. In the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed; and the mere slacking of the speed of the car by the defendant, if it was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute. 3. There is not sufficient evidence to warrant the jury to find a verdict of guilty. 4. The right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they had previously done. 5. If the jury find that the defendant went upon the track in the ordinary use of the street, without intending to obstruct the car, and continued on the track after the car came up behind him for his own convenience, and because that was the best part of the street to drive on, the defendant is not guilty. 6. In order to

establish the crime of obstructing the cars, some act must be shown besides the use of the street in the ordinary way. 7. The act incorporating the railway company created no new crime; it merely attached a new penalty. 8. In the absence of regulations as to the rate of speed, and the mode of use of the track, they have no right to any given rate of speed. The presiding judge (Bishop, J.) declined to give any of the instructions, as prayed for, but did instruct the jury, that although the public might drive their vehicles over the tracks of the railroad when the cars were not approaching, the corporation had a prior right to the track; and if the jury should find that the defendant was on the track, and hindered the progress of the car, and was requested to remove from it, and could reasonably have removed, he was bound so to do; and his remaining there, knowing that the car would be thereby obstructed, intending thereby to obstruct it, in the use of their track, was a wilful and malicious obstruction within the meaning of the statute, and that it was not material whether the defendant stopped his vehicle, or whether it continued to move on the track at the ordinary rate of such vehicles; that no other proof of malice was necessary than that the defendant knowingly and intentionally obstructed the car, although he may have made only the ordinary use of the street. To all of these rulings and instructions, and refusals to instruct, the defendant alleged exceptions. Shaw, C. J.:—"Since horse-railroads are becoming frequent in and about Boston, and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them, should be distinctly known and understood, in order to accomplish all the benefits, and, as far as practicable, avoid the inconveniences arising from their use. This is important to proprietors and grantees of the franchise, who expend their capital in providing a public accommodation, on the faith of enjoying with reasonable certainty the compensation in tolls and fares which the law assures to them; to all mayors, aldermen, selectmen, commissioners or surveyors specially appointed by law for the care and superintendence of streets and highways; to all persons for whose accommodation in the carriage of their persons and property these ways are specially designed; and to all persons having occasion to use the ways through or across which these horse-railroad cars may have occasion to pass. These railroads being of recent origin, few cases have arisen to require judicial consideration; and no

series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise. But it is the great merit of the common law, that it is founded upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many, and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require. In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State, either by general law or special enactment. It may be done by a charter or special act of incorporation in case of a bridge over broad navigable waters; or, where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws. Again: when the entire public, each according to his own exigencies, has the right to the use of the highway, in the absence of any special regulation by law the right of each is equal; but as two or more cannot occupy the same place at the same time with their persons, their horses, carriages, and teams, or other things necessary to their use, each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others; and not to encumber it over a larger space, or for a longer time, to the damage of any other, than is reasonably necessary to the beneficial enjoyment of his own right. If an adjacent proprietor has occasion to stop at his own gate with a carriage or team, if he has occasion to deliver wood, coal, or other necessities, or, if he is a trader, to deliver or receive merchandise, he must place his team or carriage, for the time being, in such a manner as to obstruct the way for the use of others as little as is reasonably practicable, and remove the obstruction within reasonable time, to be determined by all the circumstances of the case. So in the actual use of the highway. Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only,

have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot-passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their rights, and regulate their speed and movements in such a manner as not to violate the rights of such passengers. So in regard to drivers of fast and slow carriages, each must respect the rights of the other. Take a single illustration: if a heavily loaded ox-team be passing along a street wide enough for only one carriage, say fourteen feet, and other fast carriages follow, these last must, for the time being, be restrained to their speed, because this necessity results from these circumstances,—the narrowness of the way, and the ordinary slowness of the ox-team ahead. If parties thus travelling in the same direction should come to a portion of the way wide enough for carriages to pass each other, say twenty feet wide, it is obvious that if the driver of the heavy team would turn to either side, it would give the fast team room to pass, whereas, if he should keep the middle, the five or six feet on either side would not permit any carriage to pass. Now, supposing no impediment to intervene, and no circumstance should render it dangerous for the driver of the slow team to bear off, in our opinion it would be his duty to do so, although it might suit his convenience better to keep in the middle; and his refusal thus to bear off would be an abuse of his own equal and common right, for which, if injurious to another, an action would lie; and, if it was a public highway, the party would subject himself to a public prosecution. In some few cases, the regulation of the use of the highway is important enough to require a rule of positive law, requiring each traveller, when meeting, to turn to the right of the centre; in some States, to the left. But the circumstances under which travellers may be placed in relation to each other are so various, that it would be impracticable to prescribe any positive rule approaching nearer to certainty than the rule of the common law, that each shall reasonably use his own right in subordination to the like reasonable use of all others. With these views of the law regulating the use of public ways, we will examine the present case, as it appears on the exceptions. We understand that a horse-railroad and cars are a modern invention, designed for the carriage of passengers, and, though not moving with the speed of steam-cars, yet with the average speed of coaches, omnibuses, and

all carriages designed for the conveyance of persons. The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit for which these special modes of using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement. A franchise for the railroad, which the defendant was accused of obstructing, had been duly granted to the proprietors, which grant included the right to lay down tracks on a public highway, and also to use and maintain horse-cars thereon for the carriage of passengers. Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and when such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement. It appears that the proprietors of the horse-railroad, having received a franchise, had laid down a railway track, and had procured horse-cars, with suitable conductors, and were in the actual use of the track. The defendant, with a heavily loaded team, — it does not appear whether an ox-team or horse-team — was on the public street driving from Charlestown to Boston, with one of his wheels on the railroad track, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off. Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public, by the grant of the franchise, had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move, and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon therefore, is, for the time being, an unneces-

sary obstruction of the public travel, and therefore unlawful. It is stated among the above-mentioned circumstances in the bill of exceptions, as if the two vehicles were upon an equality in this respect, that there was room on either side for either vehicle to turn out. But this is mere illusion; the wagon could turn out, the cars could not; *ad impossibilia lex non cogit*. It is said, also, that it is usual for those in charge of heavy and slow teams to drive them with one wheel on the track, and that they could be driven much more easily in that place than in any other part of the street. This is no justification. Whilst the track was not required for the cars, perhaps the teamster had a right so to use it. But, when required for the cars, which could pass in no other mode, he had no legal right to consult his own convenience, to the great inconvenience, the actual injury of the equal rights of another. It is no excuse that the defendant did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or that he did not slacken his rate of speed on their approach; it is a nuisance, if, for his own benefit, he violates the rights of others; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Nor is express malice, a disposition or desire to cause damage to another, as in case of malicious mischief, necessary to the completion of the offence. It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others, and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all the necessary natural and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice, — a thing done *malo animo*, — in the sense of the law; and no other malice need be proved, to show the act to be a nuisance. If it be said that the obstruction in this case was very slight, that the cars were delayed but a very short time, — the answer is, that this is very true, and the injury may be trifling in itself, but vindicated and justified as it is in the argument, on the ground of right, it tests a principle of very great importance. If the driver of a heavily loaded truck or wagon may, for his personal convenience, use one rail of the track, wilfully, for a few hundred feet, — others may use the other rail for the like purpose, and for any distance which suits their convenience. Cars which, at the ordinary speed of horses in carriages, would pass a given space in one hour, may be three or four in accomplishing it. Passengers whose business requires them to

be at the place of destination at a fixed time, and who expect and have a right to expect that it will be reached in that time, may find their business greatly deranged. Men who, relying on the establishment of horse-cars for their daily passage, have fixed their domicile in one place and their ordinary place of business in another, may find their plans of life thus defeated. Indeed, without pursuing the effect of the right contended for into all its consequences, the establishment of such a principle might essentially impair the value of real estate in many situations. We will now consider some of the points specially raised by the bill of exceptions. 1. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street, the most convenient to him, in the ordinary way, knowing that the car would be obstructed by such use. If the term malice is here used in the sense of ill-will, a desire to injure another, as an actuating motive, the opinion of the court is, that malice need not be shown, but that, if a wilful intent to follow his own convenience in violation of the equal rights of others, exist, it is sufficient, and no other malicious motive need be proved. 2. The defendant contended, that in the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if he was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute. This position we think is untenable. We think the corporation had a right, and, in reference to passengers, were bound to move at the rate of speed usual for vehicles for the carriage of passengers drawn by horses, provided the right could be enjoyed without preventing the loaded team from moving at its usual and proper speed; and both could be done by the team ahead turning off the track, which the car in the rear could not do. It was therefore the duty of the team, in the reasonable use of the public right, to do it. What was the usual and proper rate of speed of the one was not that of the other. 3. The evidence was properly left to the jury. 4. It was contended, that the right of the horse-railroad company to use the highways is subject to the right of the public to use such highways, as they have previously done. This position we think manifestly unsound. The legislature having granted a new and peculiar use of the highways, the right of the public to use them as they had done is thereby qualified, and must be adapted to such new use. Suppose

the legislature should authorize a canal to cross a highway, with a draw, to be raised while boats are passing; the public cannot use the highway, as they have previously done, at all times, but must use it in subordination to the new right granted. So here, the law having authorized a horse-railroad, which cannot deviate from one line, other vehicles must conform their use of the way to such new and authorized use, although it prevents them, to some extent, from using it as they had previously done. The 5th, 6th, 7th, and 8th prayers for instructions, we think, were rightly rejected, for reasons which are already sufficiently stated. The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and *judgment entered on the verdict.*"¹

§ 18. A railroad is liable for any injury to *riparian proprietors*, beyond what is necessary for the use of its charter.² As for unnecessary obstruction of a stream, by means of bridges, or insufficient sluices.³ So, as is held, even though a bridge was erected by another company before incorporation of the defendants.⁴ So although not expressly required by statute to make the openings, by the want of which land is overflowed.⁵ So, if there is no difficulty in constructing a culvert under a railroad, to carry off the water from a meadow over which the railroad passes, the railroad company will be liable for flowing the meadow, if they do not make a culvert, with ditches to and from it, sufficiently low to drain off the water.⁶ But the distinction is made, that, if a culvert is so unskilfully and negligently constructed as not to vent the ordinary high-water of a stream, the railroad will be liable. But not for extraordinary floods; and it is error to leave it to the jury to say whether it was negligence, after three extraordinary floods and notices to enlarge the culvert, not to do so.⁷ So the proprietor of a mill-pond may recover for damage caused by a railroad across it, though the dam be authorized by the legislature upon a naviga-

¹ *Com. v. Temple*, Mass. S. J. C. 1860. Am. Law Reg., Sept. 1860, p. 678. See *Com. v. Hicks*, 7 Allen, 573.

² *Hooker v. New Haven, &c.*, 14 Conn. 146; *Boughton v. Carter*, 18 Johns. 406; *Steel v. Southeastern, &c.*, 32 Eng. L. & Eq. 366. See *Tillotson v. Hudson, &c.*, 15 Barb. 406; *Baltimore v. Magruder*, 34 Md. 79; *Delhi v. Youmans*, 45 N. Y. 362; *Foot v. Bronson*, 4 Lans. 47; *Cott v. Lewistown*, 36 N. Y. 214.

³ *Mellen v. Western, &c.*, 4 Gray, 301;

Hatch v. Vermont, &c., 25 Vt. 49; *March v. Portsmouth, &c.*, 19 N. H. 372.

⁴ *Brown v. Cayuga, &c.*, 2 Kern. 486; acc. *Preston v. Eastern, &c.*, 30 Law Times, 288. See *Bellinger v. N. Y.*, 23 N. Y. 42.

⁵ *Lawrence v. Great, &c.*, 4 Eng. L. & Eq. 265.

⁶ *Johnson v. Atlantic, &c.*, 35 N. H. 569. See *West v. Louisville*, 8 Bush, 404.

⁷ *Pittsburg v. Gilleland*, 56 Penn. 445.

ble river; the conditions of the act not being observed in its construction.¹ So a riparian owner may claim statutory damages, for cutting off a spring below high-water-mark; on a navigable river.² So a railroad is liable; for building an embankment at the mouth of a navigable creek, in which the plaintiff has a prescriptive right of storing, landing, and rafting lumber for the use of his saw-mill; and thus obstructing the flow of water.³ So, notwithstanding an appraisal, a railroad is liable for injury to meadows in consequence of insufficient culverts.⁴ And an action at law, and not an application to the county commissioners, under (N. Y.) Rev. Sts. c. 39, § 56, is the proper remedy, to recover damages of a railroad corporation, for filling up the bed of a natural watercourse with their embankment, and thereby flowing the land of a riparian proprietor above, which is not adjoining the railroad, it not appearing that such filling up was necessary for the construction of the road, or that a sufficient new canal could not be made.⁵

§ 19. But commissioners cannot allow damages for injury to a mill upon another lot of the same person whose land is taken.⁶ And, if property is overflowed through the defective construction of a railroad, the owner cannot recover for damages which he might have prevented by reasonable care, skill, and diligence.⁷

§ 20. The owner of a well, upon land adjoining a railroad, may recover for the subtraction of water therefrom by the construction of the road, under a statute giving all parties who suffer damage by such cause a claim for damages.⁸

§ 21. A railroad corporation is a *common carrier*.⁹ And in England, by express statute, railroads are placed on the same footing, as to rights and liabilities, with other common carriers of passengers. (a) But a railroad may pass a by-law, excluding merchandise

¹ White v. South, &c., 6 Cush. 412.

² Lehigh, &c. v. Trone, 28 Penn. 206.

³ Tinsman v. Belvidere, &c., 2 Dutch. 148.

⁴ Johnson v. Atlantic, &c., N. H. June, 1857, Law Rep.; Redfield, 154, n.

⁵ Estabrooks v. Peterborough, &c., 12 Cush. 224.

⁶ Canandaigua, &c. v. Payne, 16 Barb.

273.

⁷ Chase v. New York, &c., 24 Barb. 273.

⁸ Parker v. Boston, &c., 3 Cush. 107.

⁹ Parker v. Great, &c., 7 Man. & G. 253; Story, Bailm. § 500. See 23 Cal. 323; Parker v. Great, 15 Jur. 109.

(a) In an action against a railroad for the value of cotton lost by fire, while being transported, the question is not proper, whether every thing was done which could be done to save the cotton from being burned. And the defendant cannot introduce evidence of the caution and skill of the conductor, if the plaintiff

did not predicate his claim on proof of his want of skill. *Montgomery v. Edwards*, 41 Ala. 667. See *Gandy v. Chicago*, 30 Iowa, 420; *Jackson v. Same*, 31 Ib. 176; *Pierce v. Worcester*, 105 Mass. 199; *Rolke v. Chicago*, 26 Wis. 537; *Kellogg v. Chicago*, 26 Wis. 223; *Flynn v. San Francisco*, 40 Cal. 14.

from the passenger-trains, and limiting it to the freight-trains.¹ And a railroad, unless bound by the express terms of its charter, may refuse to carry particular goods offered.² The amount of business ordinarily done by a railroad is the measure of its obligation to furnish the means of transportation. In case of a sudden and unexpected influx of business, it is to ship the freight in the order of time in which it is offered; and its duty in this respect must have reference to each particular station, not to the entire line. The facilities of transportation, such as cars, &c., must be distributed among the various stations in proportion to the business ordinarily done at each station.³ In general, a railroad is bound to furnish ample accommodations for its business.⁴ A passenger is entitled, by the purchase of a ticket, to transportation upon the train; that there is no room within the cars, does not relieve the company of this obligation. Although such a failure on the part of the company would not justify the passenger in taking a dangerous position upon the train, or in entering and continuing upon the train, if he was fully informed of the condition before the cars started; still an answer to an action for injuries sustained, that he did take such position, with no averment that he was informed, in time to leave the train, that the company had failed to provide proper accommodations, and with no allegation that his position in any manner contributed to the injury, would constitute no defence.⁵

§ 22. As in the case of other common carriers, the question has often arisen, how far a railroad may modify its general liability by express notice.

§ 23. The defendants, a railroad company, let their tracks to the plaintiff for the transportation of horses by engines, along their road, with notice that the charge was for the carriages and power only; that the plaintiff was to see to the efficiency of the carriages, and they would not be responsible for any defect in the carriages, unless complaint was made at the time of booking, or before leaving the station, nor for any damages, however caused, to horses, &c. The plaintiff's horses being injured in consequence of the breaking of an axle-tree, caused by the defendants' negligence; held, they were not liable.⁶ So the consignee of a block of marble requested the company, A, by which it was transported,

¹ *Merihew v. Milwaukee, &c.*, 5 Law Reg. 364.

² *Johnson v. Midland, &c.*, 4 Exch. 367.

³ *Ballentine v. North*, 40 Mis. 491.

⁴ *Illinois v. Waters*, 41 Ill. 73.

⁵ *Lafayette v. Sims*, 27 Ind. 59.

⁶ *Austin v. Manchester, &c.*, 11 Eng. L. & Eq. 506. And see *Lee v. Marsh*, 43 Barb. 102; *Thayer v. St. Louis, &c.*, 22 Ind. 26.

to allow the car containing it to be removed to the depot of another road, B; aided in such removal, and procured the use of the machinery of B to unload the block. The block being broken through defect of the machinery; held, company A was not liable.¹ So the plaintiff employed the defendants, a railroad, to transport his cattle. He saw them put in the carriages, and signed a ticket as follows: "The owner undertaking all risks of conveyance whatever." Held, the defendants were not impliedly liable, on account of unfitness of the carriage for the purpose in question.²

§ 24. But, on the other hand, it is said: "From this duty" (ordinary care) "they cannot discharge themselves, even by a special agreement. Such a stipulation would be void, being against the policy of the law. Whatever has an obvious tendency to encourage guilty negligence, fraud, or crime is contrary to public policy."³ Thus a railroad is liable for loss of animals by negligence, notwithstanding a written notice, disclaiming such liability.⁴ So a railroad is liable for want of ordinary care and skill in unloading goods, though its rules, known to the consignee, provide that the consignee shall unlade within a certain time from arrival, and the consignee had notice more than that length of time prior to the unloading by the company.⁵ So the defendants, a railroad company, gave notice, of which the plaintiff had knowledge, that all goods in their warehouse would be at the owner's risk. Held, they were still liable for a loss of the plaintiff's goods, delivered at their station-house for transportation, by accidental fire.⁶ So a railroad company were authorized by statute to pass by-laws, which were to be painted upon a board and hung up at the stations, and to be binding upon all parties. They made a by-law, limiting the amount of a passenger's baggage, and providing that the company would not be responsible for the care of baggage, unless booked and paid for accordingly. Held, the company were liable for baggage delivered to their servants, and stolen; unless they proved

¹ *Lewis v. Western, &c.*, 11 Met. 509.

² *Chippendale v. Lancashire, &c.*, 7 Eng. L. & Eq. 395; acc. *Carr v. Same*, 14 Ib. 340; *M'Manus v. Same*, 30 Law Times, 321. But see *Hearn v. The London, &c.*, 29 Eng. L. & Eq. 494.

³ Per Rogers, J., *Camden, &c. v. Baldauf*, 16 Penn. 67; acc. *Penn., &c. v. M'Closkey*, 23 Ib. 526.

⁴ *Sager v. Portsmouth, &c.*, 31 Me 228.

⁵ *Kimball v. Western, &c.*, 6 Gray, 542. See *De Mott v. Laraway*, 14 Wend 225.

⁶ *Moses v. Boston, &c.*, 4 Fost. 71. See *Wood v. Crocker*, 18 Wis. 345.

that the by-law was thus hung up, or actually known to the passenger.¹ (a)

§ 24 a. The commencement of a railroad's liability, by a legal delivery of goods to its care, has been a subject of frequent consideration.

§ 24 b. If a truckman is employed to convey heavy articles to a station for transportation, his liability ends, and that of the railway begins, when the company's agents receive the articles from him and assume the charge and custody of them for transportation,—a point for the jury. Though the truckman subsequently assists the company's servants in loading on board the cars, the company will be liable for their joint negligence.² So a railroad employed a receiving and shipping clerk, to correct, tally, and check goods delivered for transportation, and hand his account to the book-keeper, who entered them on a book. By this book goods were shipped, but none were shipped until receipted. C., who had been in the habit of sending receipts for the company to sign when he delivered goods to it for transportation, sent a number of barrels to the freight-house for transportation, and directed to a person residing in a city upon the railroad. They were received by employees of the company, and the receiving clerk was present when a portion of them was delivered, and directed where to put it. The barrels

¹ *Great Western, &c. v. Goodman*, 11 Eng. L. & Eq. 546.

² *Merritt v. Old Colony*, 11 Allen, 80.

(a) A passenger, standing on the platform of a car in motion containing no vacant seats, is not thereby guilty of negligence, even if the printed notice to the contrary had been seen by him. *Willis v. Long*, 34 N. Y. 670.

A notice in a railroad bill of freight tariff: "all goods and merchandise will be at the risk of the owners while in the storehouses of the company," although brought home to the knowledge of the plaintiff, in the absence of any assent by him, will not discharge the railroad. *Blumenthal v. Brainerd*, 38 Vt. 402.

An agreement by an owner of a freight car that he will run all risks, if an agent of a railroad will attach his car to a passenger train, contrary to a regulation of the company, does not relieve it from liability for an injury to him not occasioned by so attaching the car. *Lackawanna v. Chenewith*, 52 Penn. 382.

By an indorsement on a free ticket upon a railroad, "the person accepting this

free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, for any injury to the person or for any loss or injury to the property of the passenger using this ticket," the company is not discharged from liability for gross negligence. *Illinois v. Read*, 37 Ill. 484.

So where, on the back of a ticket issued to a drover, in charge of his stock, which was to be carried over the road, was this indorsement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property, of the party using this ticket;" the drover being killed by a passing train while waiting for his own train to start. *Pennsylvania v. Henderson*, 51 Penn. 315.

were not, and C. did not ask to have them, tallied, counted, booked, or receipted. The same evening they were destroyed in the freight-house by an accidental fire. Held, the company was liable as a common carrier.¹ So where cotton was loaded upon a car, provided by the railroad for that purpose, with their express consent, and, while standing on a side track, the cotton took fire and was injured, though there was no receipt or bill of lading given.²

§ 25. The questions, whether a railroad is bound actually to *deliver* goods transported by it, or what acts will constitute constructive delivery; at what point its liability in this respect ceases; and whether and by what means it ceases to be a common carrier and becomes a mere warehouseman, with responsibilities much restricted, — have given rise to somewhat conflicting opinions and decisions. As the general result of the cases, a late elementary writer³ remarks: "The liability of the railroad as a common carrier continues, till the owner has had reasonable time and opportunity, depending of course on express or implied notice of their arrival, to take and remove them." Where goods are stolen from the depot, as matter of law, the company are not held responsible.⁴ So it is held, that the company is not liable for goods taken by mistake, and without the company's fault, from the warehouse. Otherwise, if wrongly delivered by mistake of the company's servants. And the burden of proof is on the company.⁵ So the liability does not cease, till some open and distinct act of deposit in the warehouse. Thus if the storage is made on a car, this must be separated from the train and left in the usual place. It is not enough to throw the goods down on a platform or in a station-house.⁶ (a)

¹ Coyle v. Western, 47 Barb. 152.

² Illinois v. Smyser, 38 Ill. 354.

³ Redfield on Railways, § 130. See Buckley v. Great, 18 Mich. 121; Winslow v. Vermont, 42 Vt. 700.

⁴ Lamb v. Western, &c., 7 Allen, 98.

See Cass v. Boston, 14 Ib. 448.

⁵ Lichtenhein v. Boston, &c., 11 Cush.

70. See Smith v. Nashua, &c., 7 Fost. 86.

⁶ Chicago, &c. v. Warren, 16 Ill. 502.

(a) Where one applied to a railroad for the transportation of cotton, and was informed that it should be transported within three days, and his offer to hire hands to assist in the delivery of the cotton was refused; held, that it was gross negligence in the company to suffer the cotton to remain undelivered for several months, until the larger portion had rotted by exposure to the weather, and that they were liable. Glenn v. Charlotte, 63 N. C. 510.

A railroad undertook the transporta-

tion of several tons of coal of different sorts and sizes. On arrival of the cars, the coal was unloaded by the side of the track, without preparing the ground to receive the coal by laying down boards or otherwise, so that the different sorts and sizes of coal were mixed and soil mingled with it. Held, the consignee was entitled to recover damages under a declaration alleging that the company "negligently unloaded" the coal, "mixing the same with the soil and different kinds." Rice v. Boston, 98 Mass. 212.

§ 26. But, on the other hand, the plaintiff, having intrusted goods to the servants of the defendants, a railroad company, without the knowledge of the company, took away a part of them. Held, the company were liable only as depositaries, and the burden of proof was upon the plaintiff to show how many goods were taken and how many left.¹

§ 27. In a late case in Massachusetts, the distinctions upon the general subject have been thus accurately defined. The rule, that goods must be actually delivered, "applies very properly to the case of goods carried by wagons, and other vehicles traversing the common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that from the very nature of the case the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermediate point." The duty assumed by the railroad is, "that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or the party entitled to receive them, if he is then and there ready to take them forthwith, or if the consignee is not then ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. From this view, there result two distinct liabilities: first, that of common carriers, and afterwards, that of keepers for hire."²(a)

¹ Spade v. Hudson, &c., 16 Barb. 383.

² Per Shaw, C. J., *Norway, &c. v. Boston, &c.*, 1 Gray, 263. See *People v. Chi-*

cago, 55 Ill. 95; *Homesly v. Elias*, 66 N. C. 330; *Chicago v. Scott*, 42 Ill. 132; *Mobile v. Prewitt*, 46 Ala. 63.

(a) In an action against a railroad for neglecting to transport property within a reasonable time, proof of an unexplained delay and failure to deliver, according to the general course of business, is *prima facie* evidence of want of ordinary care. *Mann v. Birchard*, 40 Vt. 326.

A railroad company is responsible for the loss of a heavy article, incurred in the act of delivery at an unusual and unfit place. As where the employees had rolled from a car a hogshead of molasses upon a "new platform," and, in their attempt to help the consignee's driver to raise it into his wagon, it burst. *Benbow v. North Carolina, Phill. (N. C.)* L. 421.

Where a consignee of goods was erroneously informed by an employee of the carrier that they had not arrived, whereby he failed to get them from a warehouse to which the carrier had sent them, and they were consumed by fire, without fault of the warehouseman; held, the carrier was liable. *Jeffersonville v. Cotton*, 29 Ind. 498.

Goods were shipped on the cars and transported to A, where they arrived at fifteen minutes before eight o'clock P.M., were unloaded, and safely placed in the warehouse. The owner had no notice of the arrival, nor was it the custom to give any such notice. Between eleven and four o'clock that night, the warehouse

§ 28. The collateral question has often arisen, whether a railroad corporation is responsible as a carrier for property delivered to it for transportation beyond the line of its own road, or merely for safe storage and delivery to the succeeding company or other carrier. Of course the liability in this respect must somewhat depend upon usage, and upon the terms of the receipt, if any, constituting the contract of the corporation, or of the public notice upon the subject, issued by it. But, independently of these considerations, there is great conflict of authorities upon the subject; the English cases sometimes extending the liability of the corporation to the entire route over which the goods are to be carried; while the weight of American authority is in favor of the more restricted rule of responsibility.¹ (a)

§ 29. Where timber carried by A arrives at the station of B, which is its destination, but B refuses to deliver it to the owner, though he tenders the charges, on the ground that B's contract with A to deliver goods for them does not include timber; and notifies him that it shall require the timber to be taken back upon the road of A: B is liable in trover.²

¹ *Hodges on Railways*, 615; *Scotthorn v. South, &c.*, 18 Eng. L. & Eq. 553; *Wilson v. York, &c.*, 1b. 557, n.; *Muschamp v. Lancaster, &c.*, 8 M. & W. 421; *Nutting v. Connecticut, &c.*, 1 Gray, 502; *Hood v. New York, &c.*, 22 Conn. 1;

Weed v. Saratoga, &c., 19 Wend. 534; *Kyle v. Laurens, &c.*, 10 Rich. Law, 382. See, as to *tickets*, *Vedder v. Fellows*, 20 N. Y. (6 Smith) 126; *Nellis v. N. Y., &c.*, 30 N. Y. (3 Tiff.) 505.

² *Rooke v. Midland, &c.*, 14 Eng. L. & Eq. 175.

and all the goods were burned. Held, the company were not liable as common carriers. *Francis v. Dubuque*, 25 Iowa, 60. See *Kesse v. Chicago*, 30 Iowa, 78.

A railroad company sent notice of the arrival of bulky goods, and that unless taken away without delay they would be stored at the expense of the owner or consignee. The owners used due diligence to remove the goods, but, before the removal could be fully accomplished, the portion remaining in the depot was destroyed by fire. Held, the company was liable as a common carrier. *Hedges v. Hudson*, 6 Rob. (N. Y.) 119.

Where a box lay in a railroad freight-house from the 17th of September to the 24th, the consignee knowing the fact; and on the night of the 24th was stolen: held, the company's responsibility for the goods, as common carriers, had ceased. *Blumenthal v. Brainerd*, 38 Vt. 402.

Goods shipped by railroad from C. to K. were safely carried to K., and, the consignee not being present to receive

them, were there stored in the company's warehouse, which was reasonably secure, and during the night were destroyed by some unknown person, who entered the warehouse through a grain shoot. Held, the railroad was not liable, except for the want of ordinary care. *Cincinnati v. McCool*, 26 Ind. 140.

(a) As to the further question of the power of a railroad corporation, whose charter of course confines its operations within the limits of its own route, even by express contract to incur any more extended liability; see *Noyes v. Rutland, &c.*, 1 Wms. 110; *Bradford v. South Carolina, &c.*, 7 Rich. Law, 201; *Wibert v. New York, &c.*, 2 Kern. 245; *Collins v. The Bristol, &c.*, 36 Eng. L. & Eq. 482; *Elmore v. Naugatuck, &c.*, 23 Conn. 457; *Foy v. Troy, &c.*, 24 Barb. 382; *Willey v. The West, &c.*, 30 Law Times, 261; *Crouch v. Great, &c.*, 29 lb. 354; *Moore v. Michigan, &c.*, 3 Mich. 23; *Naugatuck, &c. v. Waterbury, &c.*, 24 Conn. 468.

§ 29 *a*. If an arrangement or course of business exists between two railroad companies, A and B, whose roads are upon the same general route, but do not actually connect with each other, by which goods, which have been carried to the termination of A, and are destined to some point upon or beyond the line of B, are delivered to B with a bill of the expenses already incurred, from which, if found to be correct, a way-bill is made out; B is only responsible as warehousemen, and not as common carriers, for goods so received and stored by B, until the delivery of the bill of expenses.¹

§ 29 *b*. A box of goods, marked and directed to the plaintiff at Boston, was delivered by his agent, at Saratoga Springs, to the defendants. They gave a receipt in these words: "Received, Saratoga Springs, September 17, 1855, from B, in apparent good order, one Box, to forward to Castleton for B, Boston, Mass., at freight of — per 100 lbs. weight." Castleton was the terminus of their road toward Boston, and, with the Rutland and Washington Railroad with which it connected at Castleton, and other roads, a line of railroad communication was formed between Saratoga Springs and Boston. Held, the defendants were only liable for the safe delivery at the end of their own road in Castleton, and it was their duty there to deliver over to the railroad forming the next link in the line to Boston; and it was sufficient to establish, *prima facie*, a right of recovery, to show its delivery to them, and that it had not arrived at Boston, and was lost.² (*a*)

¹ Judson v. Western, &c., 4 Allen, 520.

² Brintnall v. S. & W., &c., 32 Vt. 665.

(*a*) A delivery of baggage by a railroad, at the end of its route, to the owner or to his agent, terminates the liability of the company; but the placing of the baggage in charge of A, the baggage-master of a connecting steamboat line, to be delivered at the boat, if A was authorized by agreement between the railroad and steamboat companies to receive upon the trains or at the depot of the railroad the baggage of through passengers, would not discharge them from liability for the larceny of the baggage by one of the railroad's servants, by reason of which it was not delivered at the boat, unless A was the agent of the passenger; but whether he was the agent of the railroad or of the passenger is a question for the jury. *Mobile v. Hopkins*, 41 Ala. 486.

The defendants, a railroad, gave the plaintiff a ticket, entitling her to a pas-

sage over the road to Portland, and thence by steamboat. They had built their track upon their wharf to the boat, and for a time run their passenger train upon it, and still continued to use it for baggage. A printed sign directed the passengers to use the wharf for passing to the boat, which was done; and they made the wharf subsidiary and necessary to the proper use of their road; although also requiring the passengers to disembark at their depot, forty rods from the boat. In an action for an injury upon the wharf; held, the defendants were responsible for the safe condition of the wharf, as passenger carriers, until the liability of the steamboat commenced. *Knight v. Portland*, 56 Me. 234.

The defendants were a joint-stock corporation, organized as common carriers by water between N. & L. They had

§ 30. Public safety and convenience, and a due regard to their own interest, imperatively demand from railroad corporations the

made a contract with a railroad, whose line ran from L. to S., that their boats should run daily in connection with certain trains, that through-freight received for transportation over the routes of both companies should be carried at reduced rates, that the receipts should be divided in certain proportions, that the railroad should build a wharf and depot in L. where both companies could transact their freight business, the defendants paying a rent for their use of it, with other minor provisions directed to the same general purpose of securing a through-freight business for the benefit of both. Goods having been shipped at N. for transportation to S., the defendants gave a written receipt for them as received "on board the Norwich and Worcester boat, bound for S." Held, the defendants were only bound to carry the goods to L. and there deliver them to the railroad. *Converse v. Norwich*, 33 Conn. 166.

So notwithstanding a usage between the companies, which was known to the owner of the goods, that in such cases a single bill for the amount of the freight from N. to S. should be made out by the defendants, and collected and receipted by the agent of the railroad at S. on delivery. *Ibid.*

The companies had a covered wharf in common at their common terminus, used both as a depot and wharf, and it was the established usage for the steamboat to land goods for the railroad on the arrival of its boats in the night, upon a particular place in the depot, where they were taken by the railroad the next morning, both companies having equal possession of the depot. Freight received by the steamboat for delivery to the railroad was landed in the depot and at the place in question during the night of Saturday, and was burned with the depot in the afternoon of Sunday following, the railroad having done no act in the mean time accepting delivery. Held, the steamboat had delivered the goods and was not liable for the loss of them. *Ibid.*

A receipt for goods given by the Detroit, &c. R. R. Co. stated, that the goods were "addressed to H. & S., Agent, New York, to be sent by the Detroit, &c. R. R. Co., subject to their tariff, and under the conditions stated on the other side — care Swift Sure Line, Albany [goods described], through to New York, at \$1.95 per barrel;" and on the other side was

a notice, among others, "that all goods addressed to consignees resident beyond the places at which the company have stations . . . will be forwarded to their destination by public carriers or otherwise, as opportunity may offer; . . . but that the delivery of the goods by the company will be considered as complete, and its responsibility will be considered to have ceased, when such carriers shall have received the goods for further conveyance. And the company hereby further give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occurs beyond their said limits." Held, these conditions were a part of the receipt; and it did not import a contract to carry the goods to New York, but constituted a valid limitation of liability. *Detroit v. Farmers'*, 20 Wis. 122.

The liability of the second road does not commence till that of the first is terminated by delivery of all the goods. *Gass v. N. Y.*, 99 Mass. 220.

Where goods must pass through the hands of several intermediate carriers before arriving at their destination, each remains liable until he has made delivery, either actually or by notice, to the next, or to the owner or consignee, of their arrival, with a reasonable opportunity afterwards to remove them. Mere storage at the end of his route will not relieve him. *McDonald v. Western*, 34 N. Y. 497.

An arrangement, between several connecting lines, by which each carrier, subsequent to the first, pays what is due for freight when the goods are delivered to him, and the last carrier collects the whole bill of the consignee, though these accounts are settled periodically, and each route stipulates to charge only certain rates, does not constitute a partnership or joint liability, and each line is liable only for its own negligence. *Darling v. Boston*, 11 Allen, 295.

Where a passenger purchased tickets, printed on the same slip, for transportation from one city to another, but over two roads, one to the terminus of one road, and the other to the terminus of the second road; the second ticket was held good, although he remained at the junction two months. *Brooke v. Grand*, 15 Mich. 332.

When a railroad makes contracts beyond its own road, and holds itself out as

adoption of precise and strict rules with regard to *passengers*; and numerous cases have arisen, growing out of an alleged violation of them, and the action of the company or its agents in reference to such violation. (*a*)

§ 30 *a*. Frequent questions arise, in regard to the liability for *baggage*.

§ 30 *b*. What constitutes baggage, is a question for the jury, under the circumstances of the case, and in consideration of the use, quality, value, and kind of the articles. As in case of beds and bedding of a poor man, moving with his family, which are packed in his box or trunk, with clothing.¹

§ 30 *c*. The ticket of a passenger includes the ordinary baggage required for his personal accommodation upon the journey, but not merchandise. Unless such merchandise is paid for, or, by usage or contract, is made baggage, the company do not insure it.

¹ *Quimut v. Henshaw*, 35 Vt. 605. See *Anderson v. Toledo*, 32 Iowa, 87; *Hannibal v. Swift*, 12 Wall. 262; *Rawson v. Pennsylvania*, 48 N. Y. 212.

ready to do so with all; it becomes a common carrier beyond its own limits, and is bound to receive passengers when the proper fare is paid. *Wheeler v. San Francisco*, 31 Cal. 46.

See, further, *Wellington v. Norwich*, 107 Mass. 582; *Baugh v. M'Daniel*, 42 Geo. 641; *Root v. Great*, 45 N. Y. 524; *Aldridge v. Great*, 15 C. B. (N.) 582; *Hooper v. Chicago*, 27 Wis. 81; *Railroad v. Harris*, 12 Wall. 65; *Root v. Great*, 2 Lans. 199; *Vermont v. Fitchburg*, 14 Allen, 402; *Dunson v. N. Y.*, 3 Lans. 265; *Pendergast v. Adams*, 101 Mass. 120. That a railroad is responsible for loss on a connecting road, *King v. Macon*, 62 Barb., Law Reg., Nov. 1872, p. 720; *Morse v. Brainard*, 41 Vt. 550; *Philadelphia v. Harper*, 29 Ind. 330. Contra, *Picketts v. Baltimore*, 11 Am. Law Reg. 192; *Gray v. Jackson*, 51 N. H.; Am. Law Reg., Jan. 1873, p. 53; *Baltimore v. Schumacher*, 29 Md. 176; *Green v. N. Y.*, 12 Abb. Pr. N. S. 473.

(*a*) What constitutes a railroad passenger, see *Union v. Nichols*, 11 Am. Law Reg. 32; *Shoemaker v. Kingsbury*, 12 Wall. 369.

Upon the assent of a railroad to a person's application to go on its cars to a certain station, the person becomes rightfully a passenger, entitled to go thereon, whether he has paid his fare or not, until demand and refusal to pay. Every one riding in a car is presumed to be there lawfully as a passenger, having paid, or

being liable when called on to pay his fare; and the *onus* is upon the carrier, to prove that he was a trespasser. *Hurt v. Southern*, 40 Miss. 391.

If a railroad carries passengers in a *caboose* attached to a freight train, and takes the usual fare, it is as liable for their safety as to those going on the regular passenger trains. *Edgerton v. N. Y.*, 39 N. Y. 227.

An action was held maintainable for exclusion of a colored woman from the ladies' car. *Chicago v. Williams*, 55 Ill. 185. See *West v. Miles*, 55 Penn. 209.

If the passenger is ready and willing, and offers, to pay the legal fare when demanded by the conductor, the railroad is bound to carry him, provided there is room, and he is a fit person to be admitted. *Tarbell v. Central*, 34 Cal. 616.

In an action for not conveying a passenger, it is not necessary to allege a strict legal tender of fare, but only that the plaintiff was ready and willing and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment are contemporaneous. *Ibid*.

A railroad is bound to receive from a passenger already admitted into its cars, and who has commenced his journey, legal-tender notes in payment. *Ibid*.

A railroad which exacts the legal fare in gold coin, or the value thereof in paper currency, is guilty of extortion. *Lewis v. New York*, 49 Barb. 330.

And it is not legal evidence of such liability, that other passengers, on other occasions, had taken with them in the passenger cars similar merchandise, without further proof that it was knowingly carried as baggage, and paid for by the ticket. The company are liable, however, for gross negligence, as a bailee without reward. Such negligence must be proved, and is not to be inferred from the loss.¹ *Money* is held not to be baggage.² A railroad is liable for baggage, although it would not have been legally bound to carry the passenger, and the same principle applies, where the property is improperly packed.³

§ 30 *d*. A passenger, arriving with baggage at a station, may legally consider one who handles and takes charge of the baggage upon arrival of the train, as an agent of the road; and notice to such person, while handling the baggage, of its destination, binds the company. Where baggage has reached its final destination, the company are bound to have it ready, upon arrival, for delivery, upon the platform used for this purpose, until the owner can, in the use of due diligence, call for and receive it; which he must do in reasonable time. If he does not, the company must place it in their baggage-room and keep it for him, as warehousemen. The reasonable time is immediately, making due allowance for the crowd on the platform, and this however late the hour, if it is placed on the platform and for delivery. Where passengers arrive late at night, and stop for a few hours, and it is the usage of the company, upon notice that it is going on in the morning by the next train over a connecting road, to put it in the room, and keep it for delivery in the morning to such road, when called for by the owner, and requested to do so; the company continue to be carriers, and are not warehousemen. And such usage is a consideration of great importance.⁴

§ 30 *e*. Where the ticket to a connecting road stipulates, that, in selling, the company act only as agent for roads beyond the terminus of their own road, and assume no responsibility therefor; they are not liable for baggage lost elsewhere than upon their road.⁵ But if several companies, whose lines connect into the British Provinces, have arranged together for an excursion train, and the company at the Massachusetts end of the route issues tickets, with coupons attached, for the whole distance, and its

¹ *Smith v. Boston, &c.*, 44 N. H. 325.

² *First v. Marietta*, 20 Ohio St. 259.

³ *Hannibal v. Swift*, 12 Wall. 262.

⁴ *Quimut v. Henshaw*, 35 Vt. 605.

⁵ *Pennsylvania, &c. v. Schwarzenberger*, 45 Penn. 208.

agent refuses to give a check for the luggage of a purchaser of such ticket, saying that "it would be perfectly safe, as he was to go through with them," and it is accordingly put into a baggage-car of the company, which is sent through in charge of its agent; the company is liable for a loss upon any part of the route.¹

§ 30 *f*. A railroad passenger was promised by an agent of the road, that his trunk, which was locked up in the baggage-room of another road at the time he wished to start, should be sent by the next train. He inquired for the trunk at the depot the day after his arrival at his destination, and the following day. On the third day it was found that the trunk had been placed in the common passenger room, and while there had been rifled, that room having been broken into in the night-time, when it was locked and the windows nailed down. Held, the company was guilty of negligence, even as a warehouseman, and was therefore liable. As the passenger had paid his fare, it made no difference that the trunk was not forwarded by the same train that he took.²

§ 30 *g*. In regard to the personal safety of passengers, the rule is laid down, that the utmost care is demanded from the company.³ In a late case it is held, that railroads are bound to carry passengers safely, as far as human foresight and care will permit. They are bound to use the utmost care and diligence of very cautious persons. Inability to keep the mode of conveyance in good order or repair constitutes no defence, nor that an injury occurred through an accident which frequently happens. On the contrary, this demands additional care and foresight.⁴

§ 30 *h*. A passenger upon a railroad may recover for injuries, though by request of the superintendent he was acting as brakeman.⁵ But a railroad corporation, exercising reasonable care in providing and using suitable locomotive engines and tenders on their roads, are not liable for an injury occasioned by a defect therein to a workman employed by them, while being carried over their road without paying fare.⁶ A railroad must give a passenger a reasonable opportunity to alight in safety.⁷ The plaintiff, a passenger, was set down at T., after dark, on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at T., and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket

¹ *Najac v. Boston, &c.*, 7 Allen, 329.

² *Warner v. Burlington*, 22 Iowa, 166.

³ *Thayer v. St. Louis, &c.*, 22 Ind. 26.

⁴ *Oliver v. N. Y.*, 1 Edm. Sel. C. 589.

⁵ *Chamberlain v. Milwaukie, &c.*, 11 Wis. 238.

⁶ *Seaver v. Boston, &c.*, 14 Gray, 466.

⁷ *Fairmount v. Stutley*, 54 Penn. 375.

collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. Held, evidence of negligence on the part of the company.¹

§ 31. A rule, that passengers shall go through, in the same train, or else pay fare for the remainder of the route, is valid, and binds a passenger, though not informed of it till after entering the car.² A railroad passenger, who buys a through ticket having printed upon its face "good for this day and train only," is not entitled to stop at an intermediate station and proceed in another train, although such condition was not brought to his notice until the refusal of the ticket by the conductor; the passenger being aware, when buying the ticket, that the price of it was less than the price of separate tickets to his final destination.³

§ 32. If a railroad establish and give notice of a discrimination, between the amounts of fare paid at the station and in the car; a passenger, who refuses to pay the additional sum in the car, may be ejected by the conductor, using no unnecessary force.⁴ And it has been held that the same rule applies, although the plaintiff went to the ticket-office, a reasonable time before the train left, to procure a ticket; but the office was closed, and so continued till the train left, of which the passenger informed the conductor before his expulsion.⁵

§ 33. If a passenger refuse to surrender his ticket in exchange for a check, according to the rules of the road, and without such surrender leave the car: he is liable for the fare for the distance travelled by him; or, upon his refusal to surrender his ticket or pay the fare, the conductor may eject him.⁶ (See § 35.)

§ 34. The plaintiff, being informed by the station clerk that he might return at a certain hour on an excursion-ticket, purchased the ticket and took the train, but the train did not pass through, and, at the stopping-place, the clerk demanded further fare, saying that the plaintiff should not have taken that train; and, upon his refusal to pay, the superintendent took him into custody. The

¹ *Nicholson v. Lancashire*, 3 Hurl. & Colt. 534.

² *Cheney v. Boston, &c.*, 11 Met. 121.

³ *Shedd v. Troy*, 40 Vt. 88.

⁴ *Hilliard v. Goold*, 34 N. H. 230.

⁵ *Crocker v. New London, &c.*, 24 Conn. 249. See *Jeffersonville v. Rogers*, 28 Ind. 1.

⁶ *Northern, &c. v. Page*, 22 Barb. 130.

plaintiff's attorney wrote to the secretary of the company for compensation, and the secretary requested to know the date, and promised to make inquiry. He also verbally remarked, that it was an awkward business, and the blame would fall upon the clerk, who misled the plaintiff; and offered to return the additional fare. Held, the company were not liable for the arrest.¹

§ 35. A railroad conductor has a right, using no unnecessary force, to eject from the cars, before reaching the station to which he has purchased his ticket, a passenger, who has during the passage conducted himself in a disorderly manner to the disturbance of other passengers; and he may show, in justification of the expulsion, acts of the passenger during the entire passage, it being a short one, and is not restricted to acts committed in the last three miles before the ejection. In such a case, evidence of the general character of the passenger for sobriety cannot be received. So the conductor has a right to eject a passenger who refuses to pay his fare, or to give up his ticket, on being requested by the conductor to do so, in accordance with the reasonable regulations of the road; and, in a trial of the conductor for assault and battery, by reason of such ejection, the conductor may prove such regulations.² (See § 33.)

§ 36. If a railroad company give reasonable published notice, and reasonable verbal notice in the train, of the necessity of changing cars, and a passenger by his own carelessness neglects to change cars, the fault is his own, and the company is not liable: and if, after starting from the station in a wrong direction, the error is discovered in time for him to go back to the station, and start thence without delay for the place to which he had purchased a ticket, and the company offer him the privilege of going free of charge, and he refuses to return, or to leave the cars, or to pay for the route he is travelling; he may lawfully be ejected from the train.³ Where a passenger, who had refused to pay his fare, was ejected, without injury or insult, at a place other than a regular station: held, he was entitled to only nominal damages, although the company were forbidden by law to eject passengers except at a station; and a verdict for \$450 was set aside as excessive.⁴

§ 37. But, on the other hand, railroad companies have often been held liable to damages in cases of this description. Thus the

¹ *Roe v. Birkenhead, &c.*, 7 Eng. L. & Eq. 546. See 2 Eng. L. & Eq. 406. *M'Clure v. P. W.*, 11 Am. Law Reg. 61.

² *People v. Caryl*, 3 Parker (N. Y.), 326; *Ohio, &c. v. Muhling*, 30 Ill. 9; ³ *Page v. New York, &c.*, 6 Duer, 523. ⁴ *Chicago v. Roberts*, 40 Ill. 503.

plaintiff was put off the cars for refusal to pay the fare, though he offered a ticket, dated a few days previously, but marked "good for this trip only," and not mutilated, as was the custom with tickets which had been used. Held, the words in question meant only *one continuous trip*, but not a trip on a particular day, and that the plaintiff had a right of action.¹ So, if a passenger is wrongfully ejected, and in attempting to re-enter the car is injured; he is entitled to damages, unless guilty of some negligence which contributed to such injury.² And a conductor is responsible for any excess, or improper kind, of force, even in the lawful expulsion of a passenger.³ And more especially, it seems, if the expulsion is unlawful.⁴

§ 38. It is held, in Illinois, that a passenger refusing to pay his fare on a railroad train may be ejected at any usual stopping-place, but not elsewhere.⁵ And, in Vermont,⁶ the same rule is established by statute. And trustees, in charge of the Vermont and Canada Railroad, are subject to this provision.⁷ So where an attempt is made to eject a passenger from a car *in motion*, he has the same right of resistance as in case of a direct attempt upon his life.⁸ And such resistance does not render him chargeable with *concurrent negligence*, and thus bar an action against the railroad.⁹ But in New York, where a statute provided, that, "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping-place or near any dwelling-house, as the conductor shall elect, on stopping the train;" held, under this statute, when a train had been stopped for the purpose of putting out a passenger who refused to pay his fare, the right of the conductor to put him out was not taken away by his then offering to pay the fare.¹⁰ (a)

¹ Pier v. Finch, 24 Barb. 514.

² Crocker v. New London, &c., 24 Conn.

249.

³ Hilliard v. Goold, 34 N. H. 230; State v. Ross, 2 Dutch. 224.

⁴ Law Reg., Nov. 1861, p. 59.

⁵ Chicago, &c. v. Parks, 18 Ill. 460.

⁶ Comp. Stats. 202.

⁷ Stephen v. Smith, 3 Wms. 160.

⁸ Sanford v. The 8th Av., &c., (N. Y.) Law Reg., Nov. 1861, p. 58.

⁹ Ibid.

¹⁰ People v. Jillson, 3 Parker, N. S. 234. See Ripley v. N. J., 2 Vroom, 388.

(a) A regulation, that conductors shall eject passengers refusing to pay their fare, and not afterwards accept it if offered after the cars have stopped, is authorized by (Mass.) Rev. Sts. c. 39, § 83, and may

be given in evidence in defence of such ejection. O'Brien v. Boston, 15 Gray, 20.

A passenger so ejected, though where there was no station, cannot, by climbing upon the train again before it starts and

§ 38 *a*. It is the duty of passengers to behave in a quiet and orderly manner. Passengers take the risk of mobs by the way. But unless the conductor do all that he can to quell a disturbance, and if injury result from such disturbance, the company will be responsible. But the railroad are not bound to furnish a police force sufficient to quell mobs by the wayside. And there is no such privity between a railroad and a disorderly passenger, as to make the former liable for the acts of the latter, on the principle of *respondeat superior*.¹

§ 39. A by-law provided, that each passenger should receive a ticket, to be delivered up before leaving the premises of the company, and, in default of compliance with these requisitions, pay fare from the original starting-place. A passenger being arrested for a breach of this by-law, held, it was not a by-law *imposing a penalty*, but merely imposed the liability specified as to fare; and therefore the arrest was illegal.² So a by-law provided a penalty for entering a carriage without first paying the fare. The fare to

¹ Pittsburgh v. Hinds, 53 Penn. 512.

² Chilton v. London, &c., 5 Railway Cas. 3.

tendering the fare, obtain a right to be carried by it. Ibid.

A passenger cannot lawfully be ejected from the car while the train is moving. Lane v. Illinois, 32 Iowa, 534.

A railroad is liable for an assault by the conductor upon a passenger, in attempting to seize his property to enforce payment of the fare. Ramsden v. Boston, 104 Mass. 117.

The wilful neglect of a passenger, to comply with the rules of a railroad as to purchasing a ticket before entering the cars, places him in no worse a position than a refusal to pay his fare. He may be expelled only at a usual place for the discharge of passengers. Illinois v. Sutton, 42 Ill. 438; Chicago v. Flagg, 43 Ill. 364.

Otherwise in case of refusing to surrender his ticket. Illinois v. Whittemore, 43 Ill. 420.

A passenger, ejected for refusing to pay except by an excursion ticket issued on a previous day, and marked "good for this day only," then showed a good ticket and attempted to enter the car. Held, he might be forcibly prevented. State v. Campbell, 3 Vroom, 309.

See, further, Chicago v. Herring, 57 Ill. — Am. Law Reg., March, 1873, p. 196; Coleman v. New York, 106 Mass. 160; Belknap v. Boston, 49 N. H. 358; Maples v. N. Y., (Conn.) Am. Law Reg., April,

1873, p. 231; M'Clure v. Philadelphia, 34 Md. 532; Higgins v. Watervliet, 46 N. Y. 23; Passenger v. Young, 21 Ohio, 518.

A contract is valid, in consideration of a free passage over a railroad, that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the passenger or for any loss or injury to his property during such passage; and one accepting a free pass with such a contract printed thereon is bound thereby. Kinney v. Central, 3 Vroom, 407.

A passenger is not bound by a rule, requiring him to ride on a particular train, unless such rule appears on the ticket, or he is otherwise notified of it. Maroney v. Old, 106 Mass. 153.

The right of a railroad to discriminate in fare in favor of those purchasing tickets before entering the train depends on the fact, that a reasonable opportunity has been given to obtain tickets at the office. Chicago v. Flagg, 43 Ill. 364.

But a railroad is not bound to keep open its ticket-office beyond the time of departure fixed by its published rules, though the train has not actually departed. St. Louis v. South, 43 Ill. 176.

See further, as to tickets, Fink v. Albany, 4 Lans. 147; Adwin v. N. Y., 60 Barb. 590; Boice v. Hudson, 61 Barb. 611; M'Clure v. Philadelphia, 34 Md. 532.

A was 7s., but to B, a more remote point, on account of competition, only 5s. The defendant, intending to go to A, bought a ticket for B, and offered to surrender it at A, but refused to pay the additional 2s. Held, he was not liable to the penalty.¹

§ 40. A railroad is liable for damages caused by any breach of duty in regard to the *time* of running its trains. Thus the defendants, a railroad company, continued to advertise on their time-tables, that a train would leave a station at 7.20, and arrive at another place beyond their line at 12, after this connecting train was discontinued. Held, a party who was thereby delayed and injured in his business might maintain an action.² So where the plaintiff bought an excursion-ticket, but found no return-train on the day for which it was advertised; held, he might recover the expense of returning by express.³ So a railroad advertised in the newspapers the hours of starting, and the plaintiff, who had previously bought a package of tickets, went to the station at the hour advertised, with the intention of taking that train, but found that the time had been postponed. Held, he might recover for the injury sustained by him through the delay, although the railroad had given notice of the change of hours by handbills posted in the cars and station, which he had not seen; and evidence for the defendant of a usage to postpone the starting of the train, and give notice of the postponement by handbills, was incompetent.⁴ But where the plaintiff, a miller, sent by the road of the defendants a shaft, as a model for casting a new one; and in consequence of delay in carrying it his mill was kept idle, but the defendants had no notice of the facts: held, the plaintiff was not entitled to special damages.⁵ (a)

¹ Reg. v. Frere, 29 Eng. L. & Eq. 143.

² Denton v. Great Northern, &c., 34 Eng. L. & Eq. 154. But see Hamlin v. Great Northern, &c., 38 Eng. L. & Eq. 335.

³ Hawcroft v. Great Northern, &c., 8 Eng. L. & Eq. 362.

⁴ Sears v. Eastern, 14 Allen, 433.

⁵ Blake v. Midland, &c., 10 Eng. L. & Eq. 437. See Alder v. Keighley, 15 M. & W. 117.

(a) A railway company, contracting to carry cattle from Toledo to Buffalo, was informed that the ultimate destination of the cattle was Albany or New York, but this fact was not stated in the contract. A delay occurred through the company's fault, and the market-price of cattle depreciated, while the property was not in its possession, but while on the way from Buffalo to Albany, and the loss was the direct consequence of the delay. Held, the railroad was liable. *Sisson v. Cleveland, &c. R. R. Co.*, 14 Mich. 489.

Agreement by an owner to "take, and

hereby does assume, all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, &c., or from delays," "and risk of any loss or damage which may be sustained by reason of any delay or from any other cause or thing in, or incident to or from or in loading or unloading the stock." Held, this agreement refers only to loss or damage by injuries to the stock caused by delay, &c., upon the cars, and delay in loading or unloading. *Ibid.*

A ticket does not amount to a contract

§ 41. A passenger may maintain an action for an injury, though riding upon a free ticket.¹

§ 42. Upon the principle *in pari delicto* (see chap. 4), no action lies for an injury caused by the plaintiff's own fault or neglect.² (a) Or where his negligence "contributed to the cause of the accident."³ (See § 38.) Thus no action would lie, for killing the slave of the plaintiff while asleep upon the track.⁴ Or in case of an attempt to pass under the cars.⁵ So it is held that a passenger cannot maintain an action, who, contrary to the published rules, or more especially to express notice from the conductor at the time, keeps his hand out of a window, while passing a bridge, and is injured in consequence.⁶ So the arm of a passenger, who was at a window, was broken by something coming in contact with the car, in passing stationary cars of the company on another track.

¹ Great, &c. v. Harrison, 26 Eng. L. & Eq. 443; Gillenwater v. Madison, &c., 5 Ind. 339; Noltan v. Western, &c., 15 N. Y. 444; Philadelphia, &c. v. Derby, 14 How. 468, 483. See Steamboat, &c. v. King, 16 How. 469.

² Sprong v. Boston, 60 Barb. 30. See 41 Barb. 375; The Indianapolis, &c. v. Wright, 22 Ind. 376; Illinois v. Slapton, 54 Ill. 133; Nichols v. Middlesex, 106 Mass. 463; Ward v. Central, 11 Abb. Pr.

N. S. 411; Curtis v. Detroit, 27 Wis. 158; State v. Baltimore, 24 Md. 84; Knight v. Pontchartrain, 23 La. Ann. 462; Hubener v. N. O., Ib. 492; Richardson v. North, L. R. 7 C. P. 75.

³ Clark v. Eighth, &c., 32 Barb. 657.

⁴ Richardson v. Railroad Co., 8 Rich. 120.

⁵ Central v. Dixon, 42 Geo. 327.

⁶ Laing v. Colder, 8 Barr, 479. See Curtis v. Rochester, 18 N. Y. 534.

or impose a duty, to have a train ready to start at the time at which the passenger is led to expect it. Hurst v. Great, 19 C. B. N. S. 310.

There is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character and condition, or its liability to perish. Peet v. Chicago, &c., 20 Wis. 594.

An instruction, that "press of freight will not excuse failure to carry goods in ordinary time, where such press had existed for a long time, and was known by the company when they received the goods, unless they notify the shipper," is erroneous. *Ibid.*

A contract to carry goods by a given train, which ordinarily arrives at a particular hour, does not amount to a warranty that it will so arrive, though the company know that the sender's object requires that it should so arrive. Lord v. Midland, L. R. 2 C. P. 339.

A condition, that the carrier will not be responsible for loss of market, provided the goods are delivered within a reasonable time after their arrival at the delivery station, is reasonable. *Ibid.*

If a railway make no special contract to deliver in any particular time, and a delay happens in the transportation in consequence of an unusual press in business, the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances; they are not liable for damages: but for any injury to the goods during the delay they are liable. East v. Nelson, 1 Cold. 272.

(a) A similar question may arise in case of alleged fraud. By statute, railways were bound to carry children under three years without charge, and children between three and twelve at half price. A woman, carrying her child three years and two months old, bought a ticket for herself only. No question was asked as to the child's age, and the mother had no intention to defraud. The child being injured by the negligence of the defendants; held, he could recover against them. Austin v. Great, L. R. 2 Q. B. 442.

Held, the burden was on the plaintiff to prove negligence.¹ And where, in an action by a passenger for an injury from the swinging of an unfastened door of another car standing upon a parallel track, the plaintiff's own testimony showed, that his elbow extended through an open window, beyond the place where the sash would have been, had the window been shut; held, as matter of law, the plaintiff could not recover, and it was not a case for the jury.² So, at the intersection of a railroad and highway, there are concurrent rights. A traveller on the latter cannot recover for injury caused by collision, unless he look out for approaching trains.³ So where one about to cross a track is obliged to come near it, in order to ascertain whether a train is approaching; he is peculiarly bound to ascertain this fact. If, seeing a train approach, he determines to try the speed of his horses against that of the engine; he does it at his peril. Or, if he heedlessly drives upon the track, without determining by observation whether he can safely do so.⁴ So where a team was frightened by the moving of a locomotive, ran away, and the driver, in trying to stop it, was thrown under the wheel of the wagon, and had his leg broken; held, if the accident was caused by the company's negligence alone, and in no part by the negligence of the driver, he might recover; but proof of the omission to ring the bell or whistle, or of an excessive rate of speed, was not held sufficient, without proof that the accident was occasioned thereby.⁵ So the presumption is against a cartman who drives his cart by the side of a car; the latter being confined by its track.⁶ So a deaf person is guilty of negligence in driving an unmanageable horse across the track, when a train is approaching. It is no excuse that the horse rushed upon the track near a crossing, or was driven there to avoid the engine.⁷ (a)

¹ *Holbrook v. Utica, &c.*, 2 Kern. 236.
See *Gillenwater v. Madison, &c.*, 5 Ind. 339; *Hegeman v. Western, &c.*, 16 Barb. 353.

² *Todd v. Old, &c.*, 7 Allen. 207.

³ *North, &c. v. Heilman*, 49 Penn. 60.

⁴ *Wilds v. The Hudson, &c.*, 29 N. Y. (2 Tiff.) 315.

⁵ *Pittsburgh, &c. v. Karns*, 13 Ind. 87.

⁶ *Suydam v. Grand, &c.*, 41 Barb. 375.

⁷ *Illinois, &c. v. Buckner*, 28 Ill. 299.

(a) The fourth section of the Rhode Island "act in relation to railroads" (Dig. 1844, pp. 338, 339), giving an action to any one injured, by the neglect of a railroad company to ring the bell upon their locomotive engine, for the distance, at least, of eighty rods from the place where the railroad crosses any turnpike, highway, or public way, upon the same level with the railroad, and to keep the

same ringing until the engine shall have crossed such turnpike or road; was exclusively designed for the benefit of persons crossing the turnpike, &c., on a level with the railroad. Therefore a person injured by the engine, whilst he is walking along the track of the railroad and not at any crossing, cannot recover damages against the railroad for such injury, upon the ground that it was caused by

§ 43. But in many cases railroads have been held not protected by this defence.¹ Where the negligence of the defendant was so gross as to imply a disregard of consequences, or a willingness to inflict the injury, or if he might have avoided injuring the plaintiff, notwithstanding his own negligence; the plaintiff may recover, though he was a trespasser, or did not use ordinary care to avoid the injury.² In case of gross negligence, the railroad is not excused by a provision on the ticket, that the passenger "assumes all risk."³ So, if passenger cars run upon a road so narrow as to endanger the limbs of passengers while resting in the windows; the company is bound to provide wire-gauze, bars, slats, or other barricades, to prevent passengers from putting out their arms.⁴ So an action may be maintained, though the party was injured while crossing the track, to see whether a train was coming; more especially where it is done at the suggestion of the station-agent. The question of negligence is for the jury. A person so coming is a *passenger*, and the company are held to the utmost care and diligence.⁵ So it is not a correct instruction, that, if one killed upon a railroad knew that the *fast line* was approaching, and knew his danger in time to escape, the company were not liable. The instruction should be, that he was to be charged with knowledge or regarded as knowing, if he had such warnings or opportunities of knowledge as would, with ordinary caution in those circumstances, have saved him.⁶ So the fact that no one, without some previous knowledge, can be expected to provide against the contingency of a car, with the railway upon which it stands, coming upon him by a side movement, imposes upon a railroad company extraordinary care and circumspection in moving their cars from one track to another in that unusual manner.⁷ The fact also, in

¹ See *Goodfellow v. Boston*, 106 Mass. 461; *Truex v. Erie*, 4 Lans. 198; *Groff v. Cincinnati*, 1 Cinc. 264; *Illinois v. Baches*, 55 Ill. 379.

² *Lafayette v. Adams*, 26 Ind. 76; *Indianapolis v. McClure*, 26 Ind. 370.

³ *Indiana, &c. v. Mundy*, 21 Ind. 48.

⁴ *New Jersey, &c. v. Kennard*, 21

Penn. 203. See *Indianapolis v. Rutherford*, 29 Ind. 82; *Chicago v. Pandom*, 51 Ill. 333.

⁵ *Warren v. Fitchburg, &c.*, 8 Allen, 227.

⁶ *Pennsylvania, &c. v. Henderson*, 43 Penn. 449.

⁷ *Gordon v. Railroad*, 40 Barb. 546.

their neglect to ring the bell. *O'Donnell v. Providence, &c.*, 6 R. I. 211.

The plaintiff, a passenger, while awaiting the arrival of a train of the defendants in a proper place, believing that she was in danger from the approach of the train in an unexpected direction by reason of the switch being displaced, became alarmed, and in running away tripped

over the rail, fell, and was injured. Held, the jury were warranted in returning a verdict against the company, although the plaintiff was brought into a more perilous position by running than she was in had she remained where she was standing. *Caswell v. Boston*, 98 Mass. 194.

the absence of all proof of knowledge, by a person injured, of such structure, and the danger resulting to passengers therefrom, will exonerate him from the charge of having contributed to the accident by his own carelessness.¹ So a female passenger was ordered by an officer of the train, while the cars were in motion, on a dark and rainy night, to pass forward, and, in stepping to another car, fell between the cars, and was instantly killed. Held, there was not sufficient proof of negligence in the passenger to take the case from the jury; but the question of the defendant's negligence was for them.² So where a horse-car was crowded inside; and the plaintiff stood on the front platform, there paid his fare to the conductor, who did not object to his being there, and, when the car which struck the plaintiff was seen approaching, he exerted himself to get in as safe a position as he could: held, that he was not guilty of negligence, on general principles, or in view of the statute about riding on platforms.³ So a boy, ten years old, wrongfully got upon a street railway car while in motion, without the intention or means of paying fare, and was wrongfully allowed to remain there, but afterwards the driver, while driving so fast as to make it dangerous, ordered him to jump off. In doing so, with reasonable care, the boy was injured. Held, the company was liable.⁴ (And in the same case it was held, that allowing a boy of that age to be in the street, with other boys, after dark, is not *per se* and as matter of law *negligence*.⁵) So the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake; who replied, "Yes, sir," but immediately turned the brake and started the car, whereby the plaintiff, who was in the act of alighting, was thrown into the street and injured. Held, although the request was made to the driver, not the conductor, and though the plaintiff attempted to alight from the front platform, the jury had a right to find a verdict in his favor, and the defendants could not claim a nonsuit; the plaintiff having got on at the front without objection, and no notice being proved against alighting at the front.⁶

§ 44. The company is liable for injury sustained in escaping from a danger caused by its negligence; as where a passenger leaps from the car under a reasonable fear of an impending fatal

¹ Gordon v. Railroad, 40 Barb. 546.

² McIntyre v. New York, &c., 43 Barb.

532.

³ Clark v. Eighth, &c., 32 Barb. 6.

⁴ Lovett v. Salem, &c., 9 Allen, 557.

⁵ Ibid.

⁶ Mulhado v. Brooklyn, &c., 30 N. Y. (3 Tiffa.) 370.

collision.¹ Otherwise, if he leap from the car because the train is passing the station where he desires to stop, and after the conductor has announced it, and though the conductor and brakeman promise to stop and back the train.² And, in general, where the train passes its regular station, and a passenger, who intended to stop there, leaps from the car in motion; he cannot recover.³ (a)

¹ Railroad Co. v. Aspell, 23 Penn. 147.

² Ibid.

³ Damont v. New Orleans, &c., 9 La. Ann. 441.

(a) Very numerous recent decisions illustrate the various questions which arise, in connection with railroads, upon the application of the defence *in pari delicto*, or contributory negligence. See Deyo v. New York, 34 N. Y. 9.

In an action against a railroad for the crushing of a passenger's arm in getting off the train, it appeared that the train had, according to a custom not unusual, moved upon a side track, near, but not at a station, to permit a freight train, too long to run into the side track, to pass; that, as it slackened, the plaintiff attempted to get off after being warned by the conductor against it, and while the conductor took hold of his shoulder to prevent it. Held, the plaintiff, and not the defendant, was guilty of negligence. Ohio v. Schiebe, 44 Ill. 460.

For a traveller to put his elbow or arm out of a car window, voluntarily, without any qualifying circumstances impelling him to do it, is negligence *in se*; and it is the duty of the court so to declare. Pittsburg v. McClurg, 56 Penn. 294; Indianapolis v. Rutherford, 29 Ind. 82. See Winters v. Hannibal, 39 Miss. 463.

If the intoxication of the plaintiff at the time of the injury, and his consequent want of due care, directly contributed to the injury, he cannot recover. Meyer v. Pacific, 40 Mis. 151.

The plaintiff received personal injuries while standing upon the platform of one of the cars of a train on the defendants' railroad. There was evidence of a custom to uncouple the engine and smoking-car from the rest of the train on coming into the station where the accident occurred, in order to switch them off upon a side track, and that passengers in the smoking-car were accustomed to come out of that car just before it was uncoupled, and go upon the platform of the forward passenger car, and ride into the station in that position; that this was done with the knowledge and consent and by the permission of the conductor and brakeman, and that the practice was

known to the superintendent and directors. The plaintiff had thus passed from the smoking-car, and was standing on the platform of the passenger car behind, when a collision took place between the two through the negligence of a switchman. Held, the plaintiff was guilty of negligence, and could not recover. Hickey v. Boston, 14 Allen, 429.

A railway, consisting of several lines, crossed a public foot-path near a station; but the crossing was not otherwise dangerous. There were sufficient swing-gates, as required by statute. The company, as an extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S. found the gate unfastened, and a train standing in front of it. He waited till the train moved off, and then, without looking along the line, commenced crossing, and was killed by a passing train. Had he looked along the line, he would have seen the train in time to stop. In an action by his administrator, held a nonsuit was right. Skelton v. London, L. R. 2 C. P. 631.

One who goes unnecessarily upon the double track of a railroad, over which frequent trains are passing, and at a point where intervening objects obstruct a good view of the track, is not in the exercise of due care, although he has just alighted from a train, near a station where there is nothing to indicate to him any other mode of egress. Bancroft v. Boston, 97 Mass. 275.

In an action against a railroad for injuries received from backing a train upon the plaintiff, while he was at work upon the track; it was held that the evidence showed such negligence on his part as to prevent his recovery. Carroll v. Minnesota, 13 Minn. 30.

Plaintiff's decedent came up from a cellar with two bags of shorts on his right shoulder, so that his view on that side was completely obstructed, and probably so as to prevent his hearing in his right ear, and, knowing the precise location of the track, and that trains of cars were

§ 44 *a*. We shall presently consider the subject of *injuries to animals*. The same point may be briefly noticed, in connection

constantly passing, walked on to the track, where he was run over by the cars. Persons standing around saw the cars approaching. The space from the cellar to the track was open, and used by the public to pass and repass, but was not a public crossing. Held, the company were not liable. *Rothe v. Milwaukee*, 21 Wis. 256.

It is not necessarily negligence, that one was on the track of a railroad at the time of being struck by a train. *Northern v. State*, 29 Md. 420.

The horses attached to a street car, after pulling it part way up a ferry-drop, stopped, and the driver applied the brake and held the car stationary. A, who was driving a wagon with two horses attached to it, was about ten feet behind the car when it started, and followed after it, and another team followed him. The defendants usually had an extra horse to help pull the car up the drop, but not on this occasion. The driver not being able to stop the car, it came back upon the horses of A and injured them, A being unable to get out of the way. In an action against the railway, held, there was evidence of due care on the part of A, and of negligence on the part of the defendant. *Cook v. Metropolitan*, 98 Mass. 361.

In a suit against a railroad by a passenger, for an injury occasioned by a collision, it is not sufficient for the company to show that the plaintiff was acting at the time in disobedience to an order proper to secure his safety, unless the injury was occasioned by such disobedience. *Lafayette v. Sims*, 27 Ind. 59.

That a person injured was riding in the baggage car, with the knowledge of the conductor, or riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger car. *Washburn v. Nashville*, 3 Head, 638.

In an action against a horse-railway for an injury caused to a passenger by falling from the platform of the car, and the passing of the wheel over his leg, although the plaintiff was guilty of such carelessness or negligence as contributed to and brought about the injury by falling off, yet, if the car was stopped, and afterwards the driver negligently, unskillfully, or recklessly started the car and ran over the plaintiff's leg, when, but for such

starting, he might have been rescued without further injury, the company is liable for such injury. Otherwise if the injury was occasioned by the plaintiff's attempting to get off the front platform. *McKeon v. Citizens'*, 42 Mis. 79.

It is not negligence, in law, for a passenger to follow the direction given by a servant of the company to pass from one car to another, while the train is in motion, in order to get a seat. It is a question for the jury. *McIntyre v. New York*, 37 N. Y. 287.

In an action against a horse-railroad for injuries, there was evidence, that the driver directed the plaintiff to take a dangerous position, viz., on the front platform, and the plaintiff, on nearing his destination, asked the driver to stop, and, the speed being slackened, was preparing to get off, when the horses started, and the plaintiff was thrown off. The driver testified, that he did not hear the plaintiff ask him to stop, and there was evidence that the plaintiff attempted to leave the car while it was in motion. Held, that there was not sufficient evidence of negligence on the part of the plaintiff or of care on the part of the defendant to take the case from the jury, and that a refusal to charge, that it was negligence to get on the step, as a preparation to leave the car, after having asked the driver to stop, was not erroneous. *Nichols v. Sixth*, 38 N. Y. 131.

If the plaintiff's negligence in any degree contributed to the injury, he cannot recover, although the defendants were also negligent. *Owen v. Hudson*, 35 N. Y. 516.

Where an injury is caused by the negligence of the railroad; the concurrent negligence of the plaintiff will not defeat the action, unless it was a *proximate* cause of the injury. *Northern v. State*, 29 Md. 420; *Conlin v. Charleston*, 15 Rich. (S. C.) L. 201; *Meyer v. People's R. Co.*, 43 Mis. 523.

But where the plaintiff had committed an act of great imprudence, which was at least one of the proximate causes; held, the question of negligence in the defendant became wholly unimportant, and the plaintiff should be nonsuited. *Harper v. Erie*, 3 Vroom, 88.

It is not a question of law how far a man approaching a railroad should look

with the inquiry, how far the plaintiff's own fault affects his right of action for an injury caused by a railroad.¹

¹ See *Bankard v. Baltimore*, 11 Am. Law Reg. 53.

up and down the track, but he must use his eyes and ears as men of ordinary prudence would do in like cases. *Havens v. Erie*, 53 Barb. 328.

Where the plaintiff, near a crossing, stopped, looked, and listened, four or six rods therefrom, perceiving no indication of an approaching train; this is not such negligence as to require a nonsuit. *Renwick v. New York*, 36 N. Y. 132.

The plaintiff attempted to cross a street railroad track upon the cross-way, while the defendants' horse-car was rapidly approaching, but nearly two hundred feet off, the grade being ascending, and, in so doing, slipped and fell, and was run over. The cross-way was slippery with ice, and the plaintiff was carrying a grocer's basket. Held (with dissent), that the action might be maintained, and that an instruction to the jury, that the plaintiff was only obliged to show that she exercised "common ordinary care and prudence" in going across the street, and a refusal to charge that, if there was danger of slipping or falling she ought not to have attempted to cross, were not open to exception. *Baxter v. Second*, 3 Rob. (N. Y.) 510.

The plaintiff, eight years old, tripped and fell while crossing the defendants' street railroad track, and, being unable to rise at once, was run over by a car. The defendants requested the judge to charge, that the failure of the plaintiff to look up and down the street before attempting to cross the track, to see if a car was approaching, was negligence; that his failure to see or hear the car was conclusive evidence of negligence; and that the fact of his having fallen on the track did not affect the question of the defendants' negligence, unless the driver actually saw him on the track, in time to have stopped the car before reaching him. The judge refused so to charge. The jury were instructed, that, to make out negligence of the defendants, they must be satisfied not only that the plaintiff fell on the track, and (as appeared in evidence) that the driver's face was so averted from his horses as not to see him as he lay on the track, but that, if he had seen him, the car would have been stopped by him in time to prevent a collision. The defendants requested that the words "in the exercise of ordinary care" might be added after the words "stopped by him," but the request was refused. Held, the

defendants had no ground for exception. *Mentz v. Second*, 2 Rob. (N. Y.) 356.

When a traveller is killed on a railroad crossing, in consequence of the omission of the signals of danger required by statute to be given on the approach of an engine to such crossing, the company are liable, unless his breach of duty contributed to his destruction; and he may assume in the absence of any indication to the contrary, that no engine is approaching, without the requisite public signals. So, although he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the law, instead of relying upon its observance. *Ernst v. Hudson*, 35 N. Y. 9.

Where the plaintiff by daylight drove his wagon upon the crossing within forty feet of an approaching train, and the horse being frightened had to be turned into a narrow space, whereby the wheel was struck, &c.; held, he did not use due care, and, in the absence of positive proof of negligence of the defendants, could not recover. *Schwartz v. Hudson*, 4 Rob. (N. Y.) 347.

In an action for injuries sustained by the plaintiff while driving over a street crossing in a crowded thoroughfare, without looking about him, the plaintiff offered several witnesses to prove that the flagman was absent from his post at the time of the accident, but only one asserted this positively, and it appeared from their own testimony that their attention was not directed at the time to the fact in question, and that only two of them were in a position to have seen the flagman, had he been at his post; while the defendants offered the positive testimony of four employees of the road, two of whom were not responsible for the running of the trains or the giving of signals, and also of two indifferent spectators, all unimpeached, that the flagman was at his post. Held, a verdict for the plaintiff should be set aside. *Chicago v. Gretzner*, 46 Ill. 74.

Where a traveller, by the use of his eyes and ears, in approaching a railroad track, might avoid danger, notwithstanding the neglect to give signals or warning: his omission is concurring negligence; and, where proof of this is clear, he should be nonsuited. *Ernst v. Hudson*, 39 N. Y. 61; *Wilcox v. Rome*, Ib. 358. See *Detroit v. Van Steinburg*, 17 Mich. 99.

So where a person goes upon the track

§ 44 *b*. In general, where an animal is killed upon a railroad through fault of the owner, it is held that the company will be lia-

of a railroad where it crosses a highway, and the wheels of his carriage become fastened, and it is thereby stopped on the track; unless he looks out and watches for a train, and uses all his efforts to give notice of his position, and to extricate himself as soon as possible. *Pittsburg v. Dunn*, 56 Penn. St. 280.

So held, also, where the plaintiff and his son were on horseback, driving twenty cattle along the highway, and when approaching a crossing, the plaintiff said, in reply to a remark of the son, that he thought he heard a train coming: "I guess not so soon after the other train; but let us rush them over as soon as we can for fear another train may be coming;" in his attempting to "rush them over," a coal train came along and killed three of them; the train was hid by woods till on the crossing; and no bell was rung or whistle sounded. *Ohio v. Eaves*, 42 Ill. 288.

In an action against a railroad for injuries to the plaintiff while crossing the road, the jury found a special verdict, but not that the plaintiff was crossing the road on his lawful business. They also found negligence on the part of the defendants. Held, unless the plaintiff was a traveller, he was not lawfully on the track, and the verdict was not sufficient for a judgment for the plaintiff. *Pittsburgh v. Evans*, 53 Penn. 250.

A railroad is responsible for leaving a gate open at a farm-crossing; but not for injury resulting from the neglect of the injured party to shut the gate when discovering it open. *Illinois v. McKee*, 43 Ill. 119.

A driver muffed up, who approaches slowly in a covered wagon a railroad crossing with which he is familiar, without looking out or stopping, at a place where one could not see up and down the track till within sixteen feet of it, is guilty of negligence. *Hanover v. Coyle*, 55 Penn. 396.

The absence of signal flags on a railway is not negligence as against travellers on a highway crossing; they are merely for the employees. Nor the absence of a flagman, though a train be approaching, when the bell has been rung, the whistle blown, the engine reversed, the brakes applied, and the speed greatly reduced. *Schwartz v. Hudson*, 4 Rob. (N. Y.) 347.

Where one is killed on a public crossing by a locomotive in charge of a fireman only, who did not, on approaching

the crossing, ring the bell nor blow the whistle, as required by statute; it is for the jury to determine the question of the railway's negligence. *O'Mara v. Hudson*, 38 N. Y. 445.

A passenger left the train at a crossroad adjoining a station, and, while crossing a second track, was killed by a train, which approached without whistling or ringing its bell. Held, a verdict for the plaintiff, in an action against the railroad on account of the death, was sustained by the evidence. *Gonzales v. New York*, 6 Rob. (N. Y.) 93. But see *infra*, S. C.

A person crossing a railroad at a public crossing and for a proper purpose is not *prima facie* guilty of negligence, because he happens to be on the track when a train passes, where he was carefully watching and keeping out of the way of another train then in plain sight and coming in the opposite direction. *New Jersey v. West*, 3 Vroom, 91. See *Allyn v. Boston*, 105 Mass. 77; *Mayo v. Boston*, 104 Mass. 137; *Pittsburgh v. Manner*, 21 Ohio St. 421; *Southworth v. Old*, 105 Mass. 342; *Chaffee v. Boston*, 104 Mass. 108; *Wanless v. N. E.*, 6 Q. B. (Ex. C.) 481.

A person attempting to cross a railroad track must make use of his ordinary faculties to ascertain if there is danger in the attempt. A passenger on a train, on which he frequently travelled, stepped from a car, before the train had reached its stopping-place, where there was a platform, and, according to several witnesses, while it was in motion, and on the side toward the other track. The moment he touched the ground, an express train came by, and he fell or was knocked under the wheels of his own train and killed. The track was straight, and the view unobstructed for 500 feet from the place of the accident in the direction whence the express train came. Held, the company was entitled to a nonsuit. Also, that it was error to refuse to charge, that the omission of deceased to look in the direction from which the express train was due, before attempting to cross the track, was such negligence as precluded a recovery. *Gonzales v. New York*, 38 N. Y. 440. See *supra*, S. C.

An action against a railroad was held maintainable upon the following evidence. The plaintiff, a passenger, seasonably and without undue haste passed across the track and took a proper posi-

ble only for *gross negligence*, which implies wilful injury.¹ And it is held, that for the owner to allow his cattle to run in a field next

¹ Illinois, &c. *v.* Goodwin, 30 Ill. 117; Same *v.* Phelps, 29 Ib. 447; Toledo, &c. *v.* Thomas, 18 Ind. 215; 22 Ind. 26; Chicago, &c. *v.* Cauffman, 28 Ill. 513;

Ohio, &c. *v.* Meisenheimer, 27 Ill. 30; Ohio, &c. *v.* Jones, Ib. 41. See Great *v.* Geddis, 38 Ill. 304; Toledo *v.* Ferguson, 42, 449.

tion on the platform provided for passengers about to take the train that was approaching; while standing there in a suitable place, where passengers were accustomed to be in order to enter the train, she had good reason to believe that she was in peril by the approach of an engine in an unexpected direction in consequence of the displacement of a switch; and this apprehension was adequate to excite alarm, and induce her to escape as rapidly as possible. The displacement of the switch and consequent approach of the engine were owing to the culpable negligence of the defendants' servants; and this negligence was the efficient cause of the injuries. *Caswell v. Boston*, 98 Mass. 194.

The traveller on a public highway is bound only to the exercise of ordinary care and prudence; and, if he approaches a railway and can neither see nor hear any indication of a moving train, he assumes that there is no car sufficiently near to make the crossing dangerous, especially if the signal of approach required by law is not given. A traveller need not stop to listen, or to look up and down a track, before crossing. *Ernst v. Hudson*, 35 N. Y. 9.

In an action against a railway for being run over at a crossing, the court may refuse to charge, that "it mattered not whether the bell was rung the distance of eighty rods" (this being the distance fixed by statute), "if it was rung far enough from the crossing to warn passers-by." *Havens v. Erie*, 53 Barb. 328.

A city ordinance, authorizing a railway to run their trains over certain crossings at a certain rate of speed, does not authorize the running of two trains on contiguous tracks, in opposite directions, so as to pass each other at this rate. *New Jersey v. West*, 3 Vroom, 91.

A railroad is bound to keep in a safe condition a "crossing" where a highway extends across the track. *Pittsburg v. Dunn*, 56 Penn. 230.

Where highways cross the track of a railroad, neither the company nor the public have the exclusive right to a clear passage. *Ibid.*

It is the duty of those in charge of a train, when approaching a public cross-

ing, to give notice, by blowing the whistle, ringing the bell, or in such other way as will be sufficient to warn travellers of their approach; and also to look along the track and to check the train, if necessary, to prevent a collision. *Ibid.*

Under (Mass.) Gen. Sts. c. 84, § 2, a person who goes upon a street railway, on Sunday, to visit a stranger in an adjoining town, without any occasion of necessity or charity, travels unlawfully, and cannot maintain an action for injuries sustained by him through the negligence of the company. *Stanton v. Metropolitan*, 14 Allen, 485.

In an action against a railroad for neglect to transport a lot of veal, killed when less than four years old, in a reasonable time, the fact, that the destination of the veal was within a State in which the sale of such veal was prohibited, is not a defence. *Mann v. Birchard*, 40 Vt. 326.

Under §§ 2921, 2980 of the (Geo.) Code, the rule in regard to damages by railroad accidents is this: If the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself of the defendant's negligence, he cannot recover at all. But, in other cases, the circumstance, that the plaintiff may have in some way contributed to the injury sustained, shall not entirely relieve the defendant; but the damages shall be apportioned according to the amount of default attributable to each. *Macon v. Johnson*, 38 Geo. 409.

It is no answer to an action brought by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury even although the negligent party was acting independently of the defendant. *Eaton v. Boston*, 11 Allen, 500.

The plaintiff, while riding in a train at night, and while the train was waiting near a way-station to allow another train to pass, being wrongly informed by a stranger that it was necessary to look after his baggage, left the cars, and, in walking toward the station, and when one hundred feet from the platform, fell into an open cattle-guard. Held, the

the railroad, without the fence which it was his duty to erect, is such gross negligence, as to prevent his recovering their value if killed, no matter what may be the negligence of the railroad.¹ Thus a railroad is not liable if a cow, feeding in an adjacent pasture, escapes through a defect in the fence, and is run over and killed, without proof of due care on the part of the owner to prevent such an escape.² So where bars are erected in the line of a fence, at the instance and for the accommodation of the land-owner, and he neglects to keep them up. Nor, in such case, can another owner of animals, which stray through the fence upon the track, recover of the company.³

§ 44 *c.* But, as already suggested, a railroad will be held liable for accidents of this nature, in case of gross or wanton negligence.⁴ Thus, though the cattle killed are trespassers on the road, yet they are responsible, if the killing be by their neglecting to stop the train or blow the whistle, when there was confessedly opportunity for doing both; the plaintiff not being guilty of gross negligence.⁵ So where cattle are at large without the fault of the owner, and go upon the track of a railroad, and are there killed through the negligence of the company in the management of their train; the owner may recover damages, though the cattle were trespassers on the railroad, this being not actual negligence, but a mere technical wrong.⁶ So a railroad, bound to fence, is liable, if a horse, feeding in an adjacent pasture, escapes through a defect in the fence, and is run over and killed by the cars, without proof of any care on the part of the owner to prevent such escape. And

¹ *Stucke v. Milwaukee, &c.*, 9 Wis. 202.

² *Stearns v. Old Colony, &c.*, 1 Allen, 493.

³ *Indianapolis, &c. v. Adkins*, 23 Ind. 340; *acc. Indianapolis, &c. v. Shimer*, 17 Ind. 295.

⁴ *Pritchard v. La Crosse, &c.*, 7 Wis. 232; *Thayer v. St. Louis, &c.*, 22 Ind. 26.

⁵ *Stucke v. Milwaukee, &c.*, 9 Wis. 202.

⁶ *Isbell v. New York, &c.*, 27 Conn. 393.

railroad were not liable. *Frost v. Grand*, 10 Allen, 387.

Though the owner of a freight car has persuaded an agent of a railroad to attach his car to a passenger train, contrary to the regulations of the road; he may still recover for an injury received through the negligence of the company, and not by such attachment. So although standing on the platform improperly, when the injury did not result from his so doing. *Lackawanna v. Chenewith*, 52 Penn. 382.

Where a passenger voluntarily leaves a train while in motion, to avoid being

carried beyond the station where he desires to stop, and in doing so receives an injury; he cannot recover against the company, though the conductor was also in fault in not stopping the train, and advised the passenger that he could safely jump from the train. *Jeffersonville v. Hendricks*, 26 Ind. 228; *Jeffersonville v. Swift*, *Id.* 459.

If the hour is late, and the station-house closed, when a passenger goes to take a train, and he stands where the watchman conducts him; his widow may recover for his death. *Pennsylvania v. Henderson*, 51 Penn. 315.

evidence of notice to the owner, that the horse had escaped two or three times before, and been upon the track, is immaterial.¹ So the plaintiff had driven his cows home after dark in the evening and left them in the highway in front of his house, intending to milk them there, and then put them into his enclosure, and while they were so left went into his house for a short time. While he was gone, they strayed away, and he searched for them until eleven o'clock. About ten, they were run over by the defendants' cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury, that, if the plaintiff left them there, intending to milk them within a reasonable time, and then to put them into his enclosure, and exercised ordinary care for the purpose of keeping them, he had not suffered them to *go at large*, and was not guilty of such negligence as would prevent his recovery. Held, on motion for a new trial, the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated.²

§ 45. A railroad is not liable for injury to animals improperly upon the track, unless, after discovering them, the injury might by reasonable care have been prevented. (a) As where an animal escapes into the highway, and thence upon the track; or where an animal, trespassing upon private property, strays upon the track through defect of a fence, which, *as to the owner of the land*, the company is bound to maintain. But it is otherwise in case of injury to cattle, if, as between the owner of such cattle and the company, the latter is bound to maintain the fence. But the company is not liable, if the owner of the cattle has contracted to maintain the fence, or is otherwise bound to maintain it, and has failed to do so.³ (b)

¹ Rogers v. Newburyport, &c., 1 Allen, 16; Munch v. N. Y., &c., 29 Barb. 647.

² Bulkley v. New York, &c., 27 Conn. 479.

³ Redfield on Railways, 361, c. 20;

Halloran v. New York, &c., 2 E. D. Smith, 257. See Gill v. Manchester, 28 L. T. Rep. N. S. 587; Am. Law Reg., Oct. 1873, p. 180; Cincinnati v. Smith, 22 Ohio St. 227; Toledo v. Boohless, 55 Ill. 230; Com-

(a) In case of the killing of animals at a crossing, it is very truly suggested, that the owner of the animals would himself be liable for injury to passengers. Chicago, &c. v. Cauffman, 28 Ill. 513.

If the engineer sees a cow upon the track at a distance of two or three hundred yards, and makes no attempt to

slacken speed, the company are liable for an injury to the animal in consequence, even though he was improperly on the track. Otherwise if the cow was suddenly driven on the track by a dog, and there was no fault on the engineer's part. Illinois v. Wren, 43 Ill. 77.

(b) Such a fence as a good husband-

§ 46. If a horse *takes fright* at the noise of a train, not caused by any unusual or unreasonable operation, the company is not liable to damages.¹ (a)

stock *v.* Des Moines, 32 Iowa, 376; Sika *v.* Chicago, 21 Wis. 370; New Orleans *v.* Field, 46 Miss. 573; Toledo *v.* Weaver, 34 Ind. 298; Sawyer *v.* Vermont, 105 Mass. 196; Mobile *v.* Malone, 46 Ala. 391; M'Naught *v.* Chicago, 30 Iowa, 336; Indianapolis, &c. *v.* Elliott, 20 Ind. 450; Thayer *v.* St. Louis, &c., 22 Ind. 26; McKinney *v.* The Ohio, &c., 22 Ind. 99; Indianapolis, &c. *v.* Leaman, 18 Ind. 173; Indianapolis, &c. *v.* Renner, 17 Ind. 135; Crisman *v.* Masters, 23 Ind. 319; Indian-

apolis, &c. *v.* Adkins, 23 Ind. 340; Indianapolis, &c. *v.* Townsend, 10 Ind. 38; Jeffersonville, &c. *v.* Applegate, Ib. 49; Indianapolis, &c. *v.* Meek, Ib. 502; Jeffersonville, &c. *v.* Dougherty, Ib. 549; Scaggs *v.* Baltimore, &c., 10 Md. 268; Indiana, &c. *v.* Gapen, 10 Ind. 292.

¹ Burton *v.* Philadelphia, &c., 4 Harr. 252; Bordentown, &c. *v.* Camden, &c., 2 Harr. 314. See Moshier *v.* Utica, &c., 8 Barb. 427; Coy *v.* Utica, &c., 23 Ib. 643; Aurora, &c. *v.* Grimes, 13 Ill. 585.

man generally keeps, is the standard sometimes adopted. Toledo, &c. *v.* Thomas, 18 Ind. 215.

It is sometimes held gross negligence to allow cattle to go at large near a railroad. Talmadge *v.* Rensselaer, &c., 13 Barb. 493, 497; Louisville, &c. *v.* Milton, 14 B. Monr. 75; Railroad Co. *v.* Skinner, 19 Penn. 298. But see Housatonic, &c. *v.* Waterbury, 23 Conn. 101; Lafayette, &c. *v.* Shriner, 6 Ind. 141; Fawcett *v.* York, &c., 2 Eng. L. & Eq. 289.

If the owner of an adjoining lot covenant with the company to erect and maintain the necessary fences, and fail to do so, in consequence of which his cattle are injured, neither he nor his lessee, although the latter may not be bound by the covenant, can claim damages of the corporation for injury to his cattle through such failure. Duffy *v.* New York, &c., 2 Hilt. 496.

A railroad company took land of A for its track, and, by award, paid \$500; \$200 as the value of the land, \$300 for the building and keeping in repair by A of the fences along the line of the track and his remaining land. Held, the railroad was not liable to him for damages for the killing of a horse by the cars, when such horse had leaped over his fences. Terre Haute, &c. *v.* Smith, 16 Ind. 102. But see New, &c. *v.* Maiden, 12 Ind. 10.

The defendants, a railroad company, took from A a conveyance of a right of way for certain distances on the east and west sides of the track, with a covenant for a fence on each side, and a reservation of the right of passage, not to interfere with the trains. A conveyed the land to

B, unconditionally, and B leased to the plaintiff. No fence having been made, a horse of the plaintiff was killed upon the track, where it crossed the land. Held, the plaintiff was estopped from maintaining an action. Easter *v.* The Little, &c., 14 Ohio St. 48.

A railroad is not liable for injury to animals upon the road, in case of omission to ring or whistle, unless it could have been effectual. Illinois, &c. *v.* Phelps, 29 Ill. 447.

It is negligence to permit vegetation to grow upon the road so as to conceal cattle. Bass *v.* Chicago, &c., 28 Ill. 9.

If a railroad builds cattle-guards within the limits of a street in a village, it must keep them in repair. In an action against a railroad for running over a mare, it appeared that the bell was not rung, and that the cattle-guard was out of repair. The road was held liable. Chicago, &c. *v.* Reid, 24 Ill. 144.

In case of injury to cattle, the rate of speed is a question for the jury. Central, &c. *v.* Lawrence, 13 Ohio St. 66.

Where a train was running at a greater than usual speed, upon a straight part of the road, in the day-time, and one of several cattle, feeding near, and crossing the road, was killed by the locomotive; held, to be negligence, that the speed of the train was not lessened, nor the usual mode of driving off stock by the blowing of a steam-whistle resorted to. Aycock *v.* Railroad Co., 6 Jones, 231.

Otherwise, where a beast would not be driven off from the track by a person trying to do so, and could not be scared off

(a) And a statute, making railroad companies liable for injuries to domestic animals, whether negligent or not, does

not apply to an injury from *fright*, where the animal is not touched. Peru, &c. *v.* Hasket, 10 Ind. 409.

§ 47. The statute law in England, and in many of the United States, provides an action for damages in case of *death* upon a

by the steam-whistle, the engineer using his utmost efforts to arrest the progress of the train before reaching it. *Montgomery v. Wilmington, &c.*, 6 Jones, 464.

It is the duty and right of a railroad company to carry a head-light to prevent collisions, even though it necessarily prevents the engineer from seeing obstacles on the track, in consequence of which cattle are run over. *Bellefontaine, &c. v. Schryhart*, 10 Ohio, N. S. 116.

If a horse gets upon the track at a place where no fence is required, as, *e.g.*, within a city, the company is not liable, though the injury occurs at a place where a fence is required. *Great, &c. v. Northland*, 30 Ill. 451.

In Illinois, railroads need not fence their track upon their depot grounds in a town. *Galena, &c. v. Griffin*, 31 Ill. 308.

Where a train was running upon such ground, not fenced, at the usual speed, ringing the bell at the time, a colt ran upon the road, before the engine, and was run over and killed. The colt ran upon the road from behind a building, so near the road that it could not be seen by the engineer in season to check the train; but, upon seeing it, he blew the whistle, and the breaks were put down. Held, the railroad was not liable. *Ibid.*

The railroad is not bound to keep a patrol at night to protect the fence. *Illinois, &c. v. Dickerson*, 27 Ill. 55.

Nor is it liable if the fence is thrown down and the injury occurs before notice. *The Toledo, &c. v. Fowler*, 22 Ind. 816.

Nor where a fence is burned, but, before a reasonable time for repairing it, animals are killed. *Toledo, &c. v. Daniels*, 21 Ind. 256.

But a railroad was held liable, where its servant neglected to replace bars which he took down, and cattle were killed. *Chapman v. N. Y., &c.*, 31 Barb. 399.

So, in New York, under the General Railroad Act of 1850, requiring railroad companies to erect and maintain fences on the sides of their roads, if a fence is thrown down or blown down, or becomes defective from any cause, it becomes the duty of the company to restore it within a reasonable time. And although it is thrown down by a trespasser, if the company allow it to remain so for two or three weeks, the jury may rightly find this to be negligence. *Munch v. New York, &c.*, 29 Barb. 647.

An animal was killed by a freight train, in a place where the railroad had fenced the road, but since the fencing a small town had begun to grow up, though whether immediately upon the line of the road or at a short distance, did not appear. A gap in the fence, through which the animal escaped, had been left open. Held, this evidence was not sufficient, on appeal, to authorize the Supreme Court in saying, in opposition to the jury below, that the company was not in fault in failing to close the gap. *Indianapolis, &c. v. Snelling*, 16 Ind. 435. See pp. 243, 346.

In an action against a railroad company, to recover for cattle killed by their engines, the following facts were proved: Near where the cattle were killed was a small creek over which the company had built a culvert; below the culvert was the plaintiff's pasture in which the cattle were kept, and across the creek in this pasture he had made a fence of long poles. A freshet brought down driftwood which floated through the culvert and against the fence, and the company aided it through the culvert to prevent its accumulating above to an unsafe amount. At sunset, the plaintiff knew of the exposed situation of his fence, but would not remove his cattle, and in the night the fence was swept away, the cattle went upon the road and were killed; and it was held, that the plaintiff could not recover. *Indianapolis, &c. v. Wright*, 13 Ind. 213.

In Massachusetts, St. of 1846, c. 271, requiring railroads to erect and maintain fences upon any railroad which they might hereafter construct, does not apply to a railroad which was located and partially constructed at the time of its passage. *Stearns v. Old, &c.*, 1 Allen, 493.

In New Hampshire, railroads are liable for injuries to cattle caused by want of a fence at *farm-crossings*. But not to those illegally upon the highway. *Chapin v. Sullivan, &c.*, 39 N. H. 53, 564.

In Connecticut, § 3, of the act of 1850 (Comp. 1854, p. 753), which provides that all railroads shall construct cattle-guards at highway crossings, unless in the opinion of the railroad commissioners it shall be unnecessary, applies to railroads incorporated before the passage of the act. *Bulkeley v. N. Y., &c.*, 27 Conn. 479.

The statute of Maryland, concerning cattle killed on railroads, does not expressly allow the owner to recover without regard to negligence on his part, and

railroad, caused by the fault of the company. (a) But, under such statute, no action lies where the death was instantaneous, or

therefore the common-law rule in this respect is unchanged. It merely raises a *prima facie* presumption of negligence on the part of the railroad. *Keech v. Baltimore, &c.*, 17 Md. 32.

Cattle straying on the road-bed, without fault of the owner, are to be paid for, if killed, by the railroad, unless the collision arose entirely from unavoidable accident on the part of the railroad. *Ibid.*

In North Carolina, it is not the duty of the owners of cattle to keep them within enclosures, so as to prevent them from trespassing upon the lands of others. *Laws v. North Carolina, &c.*, 7 Jones, 468.

In Indiana, railroads are bound to fence their roads and keep the fences in repair; otherwise they are liable for stock killed, under the statute; if the fences are in repair, the roads will be held to the common-law liability, simply for negligence. Although cattle pits are not expressly required to be constructed at road-crossings, they may perhaps be embraced under the general term *fence*. *New Albany, &c. v. Pace*, 13 Ind. 411. See pp. 342, 346.

A railroad is liable for killing stock where the road was not fenced, to one who is not an occupant or proprietor of the adjoining land. *New Albany, &c. v. Aston*, 13 Ind. 545; *Same v. Bishop*, *Ib.* 566.

No fence is required in the immediate vicinity of the engine-house, machine-shops, car-house, and wood-yard. *Indianapolis, &c. v. Oestel*, 20 Ind. 231.

Statute of 1853, with regard to the liability for killing cattle when the road is not fenced, applies only to cases before a justice; in other courts the plaintiff must rely only on his rights at common law. *Evansville, &c. v. Ross*, 12 Ind. 446.

In Missouri and Illinois, negligence and unskilfulness are not essential to a recovery under the statute, if the acci-

dent happened where there was no fence and no crossing, or where the crossing was not protected by a cattle-guard. *Miles v. Hannibal, &c.*, 31 Mis. 407; *Galena, &c. v. Crawford*, 25 Ill. 529.

In Missouri, under § 5 of the act of December 12, 1855, railroads are liable for animals killed, irrespective of the question of negligence, unless the accident occurs within enclosed fields, or at a road-crossing. *Burton v. North, &c.*, 30 Mis. 372. See *Gorman v. Pacific, &c.*, 26 Mis. 441; p. 346.

And the liability, in this respect, is the same in the case of companies to which § 52 of the General Railroad Act is applicable. *Ibid.*

In Kentucky, the paramount duty of a railroad, through its agents intrusted with the conduct of a train, is to look to the safety of the persons and property thereon; subordinate to which is the duty to avoid unnecessary injury to animals straying upon the road. *Louisville, &c. v. Ballard*, 2 Met. 177.

A railroad company, which is not bound to fence its track, is not liable for injuries inflicted upon cattle, &c., straying upon the track, unless caused by the wanton and reckless negligence of the company, or its agents or servants. *Ibid.*

In Iowa, cattle are lawfully permitted to run at large, and their being found upon a railroad is not of itself evidence of negligence on the part of the owner. If the company have properly enclosed the road, they will be liable only for gross negligence. Otherwise, for any injury occasioned through the want of ordinary care and prudence. *Alger v. Mississippi, &c.*, 10 Iowa, 268.

In Wisconsin, railroads are not bound to fence. The cost goes into land damages. *Stucke v. Milwaukie, &c.*, 9 Wis. 202. See p. 346.

In California, the rule of the common

(a) In North Carolina, an action for personal injuries sustained by a passenger on a railroad does not abate by the death of the plaintiff. *Peebles v. North*, 63 N. C. 238.

It was held that to sustain an action against a railroad for running over and killing a negro, the plaintiff must show that the death was caused by the neglect, mismanagement, or carelessness of the company, or its employees. *Mann v. Mann*, 32 Geo. 345.

In an action against a railroad under art. 65 of the (Md.) Code, for the killing of the plaintiff's wife, an instruction, which requires proof on the part of the plaintiff, "that the defendant or its agents were so grossly careless as that the exercise of proper caution on the part of the wife of plaintiff would not have protected her from injury, is erroneous. *Baltimore v. State*, 29 Md. 460.

simultaneous with the injury ; the act providing for an action in favor of the party's representatives "in the same manner as if he

law, requiring cattle to be confined within a close, is not in force. *Waters v. Moss*, 12 Cal. 535.

Though cattle may run at large, yet no person or corporation is answerable for the natural consequences of their intrusion into dangerous places ; and, if they get on to a railroad and are injured, the company is liable only if the reasonable exertions of their agents could have prevented the injury. *Richmond v. Sacramento, &c.*, 18 Cal. 351.

Allowing one's cows to go at large, near the line of a railroad, is not such negligence, as to excuse the company from the use of ordinary precautions and reasonable care and diligence to avoid injuring them. *Ibid.*

If a cow on a railroad track can be seen some distance ahead by the conductor, and by the ordinary means he could get her off unhurt, the company is responsible in damages for an injury arising from his failure to use these means. *Ibid.*

The statute, requiring railroad companies to fence, is not to be taken solely as a police regulation, for the benefit of passengers, to the exclusion of its application to cases of stock killed by freight trains. *Indianapolis, &c. v. Snelling*, 16 Ind. 435.

The object of such provisions in railroad charters is to protect the public, and, if violated, the company will be liable for all damages to animals straying upon the track through the want of proper fences, without reference to the want of skill in operating the road at the time, or to the right to have the cattle where they could escape on to the track. *McCall v. Chamberlain*, 13 Wis. 637.

In the passage of the statute concerning animals running at large, the legislature looked to agricultural interests rather than the protection of railroad property. The statute requiring railroads to be fenced is in the nature of a police regulation, partly for the safety of passengers, and could therefore be enacted after the incorporation of the road. *New Albany, &c. v. Tilton*, 12 Ind. 3 ; *Same v. Maiden*, 12 Ind. 10 ; *Indianapolis, &c. v. McAhren*, *Ib.* 552.

And therefore, on the score of public policy, the railroad may be liable for cattle killed, where the road is not fenced, although the cattle be trespassers. *Ibid.* ; *New Albany, &c. v. Fix*, *Ib.* 485.

Hence the railroad cannot divest itself of

responsibility by agreeing with separate landholders along the road that they shall keep up the fences ; it is a public duty imposed on the railroad, of which it cannot divest itself. *Same v. Maiden*, *supra*.

In England, a railway company is bound so to fence a station, that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest to the station. *Burgess v. Great, &c.*, 6 C. B. N. S. 923.

The following recent cases in different States for the most part affirm those already cited.

In Massachusetts, a railroad built and maintained a fence with bars between their track and an adjoining pasture, as required by statute. The bars being left down, a cow belonging to the owner of the pasture escaped upon the track, and afterward turned into another pasture, and thence, but in what way did not appear, reached the track again, where she was run over and killed by the engine. Held, the owner could not recover damages therefor, without proof that the bars were left open without fault on his part, and that the cow was enabled to reach the track a second time by negligence on the part of the company. *Eames v. Boston*, 14 Allen, 151.

A railroad company are not liable to the owner of sheep which have strayed upon the land of another, and thence upon the track through a defective fence, where they were killed, although the fence was one which the company were bound to keep in repair. *Ibid.*

"Suitable" fences, which a railroad company are required to maintain under (Mass.) Gen. Sts. c. 63, § 43, need not be such "suitable" fences as adjoining owners of land are required to maintain under Gen. Sts. c. 25, § 1. *Eames v. Salem*, 98 Mass. 560. But see *Enright v. San Francisco*, 33 Cal. 230.

In New Hampshire, a railroad is not bound to maintain a fence against cattle unlawfully in an adjoining pasture. *Mayberry v. Concord*, 47 N. H. 391.

In New York, although a railroad accident was occasioned primarily by the negligence of the owners of a drove of cattle, in allowing them to stray upon the track ; the railroad will still be responsible to an injured passenger if the accident might have been prevented by proper precautions

were living," and in case of "the death of any person entitled to bring such action."¹ Nor can such action be maintained, if the

¹ *Hollenbeck v. Berkshire, &c.*, 9 Cush. 478, 481; *Eden v. Lexington, &c.*, 14 B. Monr. 204.

on the part of the officers of the train. *Card v. New York*, 50 Barb. 39.

Under § 44 of the (N. Y.) General Railroad Act, as amended by the act of April 15th, 1854, an action lies against a railroad for the loss of a cow killed by one of its locomotives while running on the track, at an unfenced point, of another company, organized, not to become a common carrier, but solely to build a railroad through a city for the use of the defendant and other companies, running trains to and from that city, and whose road was owned and operated solely by those companies. *Tracy v. Troy*, 38 N. Y. 433.

In New Jersey, the plaintiff's horses escaped from his pasture over his fence, and got upon the track of the defendants, and, while there, the train came along at its usual speed, and ran over and killed them. There was no evidence of an intent to injure the horses. Held, the plaintiff was not entitled to recover, although there was evidence from which it might be inferred that the engineer could by possibility have avoided the collision. *Price v. New Jersey*, 3 Vroom, 19.

In Illinois, an embankment from twelve to twenty feet in height, beside a railroad track, so gradual in its slope that cattle can descend upon the track, will not render a fence unnecessary. *Toledo v. Sweeney*, 41 Ill. 226.

In an action against a railroad for failing to fence their track, whereby the plaintiff's mules were killed, and for damages to the mules through the negligence of the company, the plaintiff cannot recover, if he has been guilty of negligence contributing to the injury, unless it appears to the jury that the defendant has been guilty of negligence more gross. *Illinois v. Middlesworth*, 43 Ill. 64.

An instruction to the jury, that a railroad company are bound to keep a fence in repair, if once constructed, whether the company have been in operation six months or not, is erroneous. *Toledo v. Miller*, 45 Ill. 42.

Under the statute, a railroad is liable for all damages resulting from its neglect to fence or to maintain a sufficient fence, whether they used due care in other respects or not. *St. Louis v. Linder*, 39 Ill. 433.

A railroad is liable for injuries to cattle, which have got upon the road at a place where the company are not bound to

maintain a fence, only in case of gross negligence. *Ibid.*

A railroad is not liable, where the fence was broken by the unlawful act of a stranger, until sufficient time for notice and repair. *Chicago v. Barrie*, 55 Ill. 226. See *Chicago v. Harris*, 54 Ill. 528.

In an action against a railroad for killing stock, it appeared that the engine driver had sounded the whistle, upon seeing the animals on the track, and, failing to frighten them off, had wilfully run over them, although there was time to stop the train. Held, the company were liable, though the plaintiff had wrongfully made use of the company's fence as one side of an enclosure for the animals, and they had reached the track by breaking down the fence. *Illinois v. Middlesworth*, 46 Ill. 494.

In Iowa, under c. 169 of the Laws of the Ninth General Assembly, a railroad company are liable for swine killed, while running at large, at a point on their road where there was no fence, and where they had the right to fence. So although the swine were at large contrary to a regulation of the county, where no wilful act of the owner occasioned the injury. *Spence v. Chicago*, 25 Iowa, 139.

Sect. 6, Laws of 1862, c. 169, providing that, if a railroad fail to fence against live stock, at all points where they have a right to fence, they shall be liable for all stock killed, does not apply in all cases where there is a strict or abstract right to fence, if the injury occurs where to build a fence would be improper. The liability then is not absolute, but depends on the question of negligence. *Davis v. Burlington*, 26 Iowa, 549.

The law was not intended to apply to depot grounds, especially where in a town or city, intersected by streets, or where the switches run along and upon the streets. *Ibid.*

No recovery can be had against a lessee of a railroad, in possession of and operating it, under Laws of 1862, c. 159, § 6, making railroad companies liable for stock injured upon their roads operated at points where they have the right to fence, &c., and omit to do so. *Liddle v. Keokuk*, 23 Iowa, 378.

But the lessee might be liable for such injury, if the result of his own or his employee's negligence. *Ibid.*

In Indiana, in an action against a railroad for killing a cow, the complaint al-

party's own negligence contributed to the injury.¹ Thus a lunatic was riding, in charge of his father, who had paid the fare of both, through, and taken tickets. The father got out at a station for refreshments, and the train left him behind. The conductor, not knowing the son to be a lunatic, or that the fare had been paid,

¹ *Tucker v. Chaplin*, 2 Car. & K. 730.

leged the injury to have been caused by the negligence of the company's servants. The county board had passed an order allowing such animals to run at large; the cow was killed at the crossing of a public highway; the whistle was not sounded, nor the bell rung, and the train was running at unusual speed; but a storm made it difficult to see or hear at any great distance. Held, the action could not be maintained. The company was in the lawful use of its own property, in such a manner that the injury complained of was not the natural or probable consequence of the act. *Michigan Southern v. Fisher*, 27 Ind. 96.

The liability of a railroad for defect of fences extends to companies organized under special charters. *Indianapolis v. Marshall*, 27 Ind. 300.

Also to all kinds of animals that would be kept from the track by an ordinary fence, whether they are large enough to throw a train off the track when run over by it or not. *Ibid.*

In Wisconsin, the statutory liability, when, in consequence of the failure of a railway to maintain as well as erect a fence, injury is done to animals which get upon the track, is absolute. *Brown v. Milwaukee*, 21 Wis. 39.

A railroad must exercise a *high* degree of diligence in keeping fences in repair; more than *ordinary*. *Abtisdell v. Chicago*, 26 Wis. 145.

In California, a statute, requiring a railroad to maintain fences on the sides of its track, is designed for the protection of adjoining owners, and may be waived by them; and such waiver will exonerate the company from liability for injuries to cattle. *Enright v. San Francisco*, 33 Cal. 230. See *McCoy v. California*, 40 Cal. 532.

In Missouri, the owner of animals is under no obligation to fence them in; that is, in not confining them, he is in no fault, nor guilty of any negligence. But a declaration averring that, without any negligence on the part of the plaintiff, the defendant's mules, unlawfully and by reason of the defendant's negligence, came upon the railroad track of the plaintiff,

and came in contact with the plaintiff's locomotive and cars, thereby greatly damaging the same, states a good cause of action, and is not demurrable. *Hannibal v. Kenney*, 41 Mis. 271. See p. 343.

In Wisconsin, when a railroad erects, maintains, and keeps in good condition proper fences and cattle-guards, cattle escaping from enclosures adjoining the road upon the track become trespassers, and the law charges the owner with negligence, though he may not be guilty of actual carelessness. *Fisher v. Farmers'*, 21 Wis. 73. See p. 343.

In Indiana, if the owner of cattle knowingly permits them to run at large in the vicinity of a railway crossing, upon a public highway, and they wander upon the track and are run over by a train without any fault or neglect on the part of the company, and the train is damaged thereby; he is liable to the company. *Sinram v. Pittsburgh*, 28 Ind. 244. See pp. 342-3.

So although the board of county commissioners have, under the statute, passed an order, permitting cattle and swine to run at large upon the uninclosed lands or public commons within the bounds of the township where the accident happened. *Ibid.*

For the law of Iowa, see *Stewart v. Burlington*, 32 Iowa, 561; *Lemmon v. Chicago*, 32 Iowa, 151; *Aylesworth v. Chicago*, 30 Iowa, 459; *Dewey v. Chicago*, 31 Ib. 373. See, further, *Huston v. Cincinnati*, 21 Ohio St. 235; *Trice v. Hannibal*, 49 Mis. 438; *Lloyd v. Pacific*, 49 Mis. 199; *Jeffersonville v. Parkhurst*, 34 Ind. 501; *Seward v. Chicago*, 30 Iowa, 551; *Andrie v. North-western*, 30 Iowa, 107; *Eames v. Worcester*, 105 Mass. 193; *Sawyer v. Vermont*, 105 Mass. 196; *Shepard v. Buffalo*, 35 N. Y. 641; *Bradley v. Buffalo*, 34 N. Y. 427; *Cooley v. Brainerd*, 38 Vt. 394; *Blair v. Milwaukee*, 20 Wis. 254; *Miss. v. Miller*, 40 Miss. 45; *Price v. N. J.* 229; *Balcom v. Dubuque*, 21 Iowa, 102; *Whitbeck v. Same*, Ib. 103; *Evans v. Burlington*, 21 Ib. 374; *Great v. Hanks*, 36 Ill. 281; *St. Louis v. Todd*, 36 Ill. 409; *Chicago v. Cauffman*, 38, 424; — *v. Utley*, Ib. 410; *Calvert v. Hannibal*, 38 Mis. 467; *Indianapolis v. Irish*, 26 Ind. 268.

applied for his ticket, and, not receiving it, stopped the train and had him put out, and he was killed by another train. Held, an action did not lie against the company.¹ So an action does not lie under the statute, where the accident was caused by the negligence of a fellow-servant, unless habitually careless and unskilful; or by the use of defective machinery, known by the party to be unsafe.² (See chap. 40.) And in New York an action is held not to lie, where the death occurred in another country.³

§ 48. It is held that no damages can be allowed for the mental sufferings of the survivors.⁴ But the damages are to be a reasonable compensation, not an amount estimated by the annuity-tables, according to the value of the party's life.⁵

§ 49. Inasmuch as a railroad company, like other corporations, must become liable for the most part through the acts of its servants or agents, not expressly or formally authorized; (a) it requires to be but briefly stated, that, according to the general rule of *master and servant*, a railroad is liable for the acts of its servant, acting in the due course of his employment, although he does not follow, or actually disobeys its instructions, either general or special;⁶ as in the obvious and familiar cases of taking excessive freight or fare; improperly refusing tickets; or recklessly causing the death of animals or human beings.⁷ For any abuse of authority, whether of omission or commission, by the conductor of a train, while in the line of his duty collecting fares, the cor-

¹ Willets v. Buffalo, &c., 14 Barb. 585. See Pennsylvania, &c. v. Ogier, 35 Penn. 60; North v. Robinson, 44 Penn. 175.

² Hough v. New Orleans, &c., 6 La. Ann. 415; M'Millan v. Saratoga, &c., 20 Barb. 449.

³ Crowley v. Panama, &c., 30 Barb. 99.

⁴ Blake v. Midland, &c., 10 Eng. L. & Eq. 437. See Morse v. Auburn, &c., 10 Barb. 621, 623.

⁵ Armsworth v. South-eastern, &c., 11 Jur. 758. See Oldfield v. New York, &c., 3 E. D. Smith, 103.

⁶ Philadelphia, &c. v. Derby, 14 How. 468; Lowell v. Boston, &c., 23 Pick. 24; South-eastern, &c. v. European, &c., 24 Eng. L. & Eq. 513. See Philadelphia, &c. v. Wilt, 4 Whart. 143; Machu v. London, &c., 2 Exch. 415; Goff v. Great, 3 Ell. & Ell. 672.

⁷ Alabama, &c. v. Kidd, 29 Ala. 221.

(a) Under the (Mich.) General Railroad Act, the liability of corporations organized under it, and their agents, for damages which may result from the neglect of the corporation to erect and maintain fences on the side of the line of the road, attaches, as soon as they have possession of the route for the purpose of constructing the road. A contractor for the construction of the road is an agent of the corporation, within the meaning of this provision.

Where, therefore, while a contractor was engaged in constructing a railroad

through certain premises, and had taken away the fences across the line for that purpose, sheep of the owner of the premises escaped through the opening so made, and were lost; held, the contractor was liable to the owner for the loss. And this, although the owner turned the sheep into the field through which the line ran, after the route was so taken possession of, and while the contractor was constantly throwing down the fences for his purposes. Gardner v. Smith, 7 Mich. 410.

poration is responsible.¹ Thus a railroad company is liable for injuries resulting from the negligence, violence, or carelessness of its conductors, in removing from the cars a passenger who refused to pay his fare or produce a ticket; causing his death.² So if the station-master, or any one to whom he refers the owner of goods, refuse to deliver them; the company is liable in trover.³ So, although the train is hired for an excursion, the company is liable for negligence of its servants;⁴ or although the train is under control of State officers.⁵ And the motive influencing the servant is immaterial; as in case of delay caused by a conspiracy of its employees.⁶ But in England a railroad is held not liable to a passenger, arrested by its servant for non-payment of fare.⁷ (a)

§ 49 a. It will be seen (chap. 40) that in general a master is not responsible to one servant for injury caused by the negligence of another. This principle has been often applied in the case of railroads. It is held applicable, where the servants are engaged *in the same general undertaking*, without reference to relative rank; as where one employed in coupling and uncoupling trains was injured by neglect of the engineer and conductor;⁸ or where a brakeman

¹ Baltimore v. Blocher, 27 Md. 277.

² Pennsylvania, &c. v. Vandiver, 42 Penn. 365.

³ Rooke v. Midland, &c., 14 Eng. L. & Eq. 175.

⁴ Skinner v. London, &c., 2 Eng. L. & Eq. 360.

⁵ Peters v. Rylands, 20 Penn. 497.

⁶ Blackstock v. N. Y., &c., 20 N. Y. 48.

⁷ Eastern, &c. v. Broom, 6 Railway Cas. 561.

⁸ Wilson v. The Madison, &c., 18 Ind. 226; 22 Ind. 26.

(a) Where a person who had been struck by a train was taken up apparently dead, and, without notice to his family or to any person who would have taken an interest in him, and without sending for a physician, was taken into the warehouse of the company and locked up all night, and the next morning it was found that he had during the night revived and had moved some paces, and had apparently died from hemorrhage; held, it was competent for the jury to conclude that there was negligence, and that the railroad was liable for the treatment subsequent to the collision. *Northern v. State*, 29 Md. 420.

In an action against a railroad on account of a death occasioned by the explosion of a boiler; held, even if the employees did not positively know that the engine was unsafe, yet, if in fact it was unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led by the use of proper diligence to a knowl-

edge of the facts, the company must be held liable. *Chicago v. Shannon*, 48 Ill. 338.

If the superintendent of a railroad be clothed with the authority of the board of directors, as to the entire control and management of the trains, the company is liable for an injury resulting from his negligence or improper order. *Washburn v. Nashville*, 3 Head, 638.

In an action by a passenger against a railroad for personal injuries resulting from collision with a coal train, evidence of the habits and competency of the conductor of the coal train is admissible. *Penn. v. Books*, 57 Penn. 339.

Proof of a habit of intoxication in a conductor raises in case of an accident a presumption of negligence. *Ibid.*

The declarations of an engineer, at the time of an accident, and growing out of it, are admissible, as part of the *res gestæ*, to prove his own negligence, and charge his employers. *Hanover v. Coyle*, 55 Penn. 396.

was injured by neglect of a switch-tender.¹ But it is otherwise in case of the employment of incompetent persons, or the use of unsafe machinery, or an unsafe road.² As in case of want of repair in the road-bed. Thus where a servant was employed to uncouple the cars, which could not be done while the train was still, and which he was doing while they were moving, although he had notice of the defect; the question of negligence was held to be for the jury.³ So a railroad company is responsible for causing the death, by running an engine upon him, of a person employed by them to unload their cars, at the spot in question, on a side track; there being other tracks which might have been used, though less conveniently, and although the party had been warned that it was a dangerous place, and although the accident occurred in part from the frightening of his horses.⁴

§ 49 *b*. The question has been raised, whether a railroad corporation is responsible, where it is not itself immediately engaged in conducting the road. Upon this point it is held, that a railroad is liable for injury by fire from its engine, notwithstanding a lease of the road to another company.⁵ So where the road is used by another corporation.⁶ So a railroad is liable for goods delivered to be carried to the State line, though it has leased that part of the road to a corporation chartered in an adjoining State, whose road connects with it at the line.⁷ So, by an agreement between the defendant and another railroad, the defendant was to appoint an agent to receive and collect freight, to sell all passenger tickets, and to receive the revenues accruing from the joint operations of the two companies. Held, by this agreement there was no partition of the agency as to the sales of through-tickets over both roads, and the defendant was responsible for the manner in which this agent discharged his duty in the sale of such tickets.⁸ So a railroad agreed with individuals, that they might run the road at their own expense, and receive the receipts, "the trains to be run under the direction of the company, and be under their control." Held, the company was liable for the loss of the plaintiff's horse, which, being lawfully on an adjoining lot, strayed therefrom on to

¹ *Slattery v. Toledo, &c.*, 23 Ind. 81.

² *Thayer v. St. Louis, &c.*, 22 Ind. 26. 438.

³ *Snow v. Housatonic, &c.*, 8 Allen,

441. See *Harrison v. Central*, 2 Vroom,

293; *Tinney v. Boston*, 62 Barb. 218.

⁴ *Newson v. New York, &c.*, 29 N. Y. 103.

(2 Tiffa.) 383.

⁵ *Ingersoll v. Stockbridge, &c.*, 8 Allen,

⁶ *Indianapolis, &c. v. Solomon*, 23 Ind.

534.

⁷ *Langley v. Boston, &c.*, 10 Gray,

⁸ *Northern, &c. v. Scholl*, 16 Md. 331.

the road and was killed, no fence having been erected by the company as the law required.¹

§ 49 *c.* But, on the other hand, it is held that the lessee of a railroad, running it for his own benefit, assumes all the public responsibilities of the company, and will be liable for damages to cattle escaping on to the road through the want of fences which they were bound to erect.²

§ 49 *d.* Although a railroad is responsible for an injury, occasioned by want of proper care and prudence on the part of its servants, in the management of a train which is under their exclusive care, direction, and control, though the train belongs to another company; if such injury is occasioned by the negligence of another railroad, whose car, for the purpose of being loaded by the plaintiff, has been placed upon a side-track of the defendants, which is in constant use by other roads, such other company is bound to use reasonable care to prevent a collision, and, if it fails to do so, and the plaintiff receives an injury from a collision while engaged in loading the car, he cannot recover against the company whose cars caused the collision. If such injury results from the negligence of another railroad, which has a joint right with the defendants to use the defendants' track, under a lease from the defendants, and which is accordingly running trains over the defendants' road on its own account, the defendants are not responsible.³ (*a*)

§ 50. Some miscellaneous examples of the rights and liabilities of railroad corporations will close the present chapter.

§ 50 *a.* Injuries to adjacent property, by fire communicated from the engine, are among the most common causes of action against railroad corporations.⁴

§ 50 *b.* A railroad is required to use the same diligence, in removing dry weeds and grass, and all other combustible materials,

¹ Wyman v. Penobscot, &c., 46 Me. 162; Illinois, &c. v. Finnigan, 21 Ill. 646.

² McCall v. Chamberlain, 13 Mis. 637.

³ Fletcher v. Boston, &c., 1 Allen, 9.

⁴ See King v. Morris, 3 Green, 397; Lackawanna v. Doak, 52 Penn. 379.

(*a*) A railroad, which, by agreement, uses a defective road owned by another company, and controls the running of its own train over it, is liable for all injuries resulting from its own use of the road. Illinois v. Kanouse, 39 Ill. 272.

Although a railroad enjoys, by its charter, a special exemption from liability, yet, if it operates the road of another company under a lease, it takes the liability of the lessor, under the (Mich.) General Railroad Law, as a common

carrier. McMillan v. Michigan, 16 Mich. 79.

A railroad, owning a road which is used by another company, is liable for damage resulting from the unfenced condition of the road, although done by the trains of the latter. Toledo v. Rumbold, 40 Ill. 143.

As to liability where the road is in the hands of a receiver, see Ohio, &c. v. Davis, 23 Ind. 553; Ohio, &c. v. Fitch, 20 Ind. 498.

from exposure to ignition by the locomotive, that a cautious and prudent man would use in reference to combustible materials upon his own premises, if exposed to the same hazard from fire as dry grass upon the side of a railway. The question of negligence here is not a conclusion of law, but a fact to be determined by the jury, in view of the season of the year, and all the circumstances affecting liability to fire.¹

§ 50 *c.* The emission of sparks from a locomotive is not in itself illegal; and the loss of adjacent property from the sparks, apart from misuse, is *damnum absque injuria*.² But a railroad is bound to use all the appliances of science and the highest degree of diligence to prevent such destruction by the escape of fire;³ and the burden of proof is upon the railroad, to show that the engine was properly guarded,⁴ and equipped with the best-known mechanical contrivances to prevent such escape.⁵

§ 50 *d.* In an action against a railroad for damages resulting from a fire caught from sparks, evidence, that some of its locomotives had about the same time thrown live sparks into a meadow one hundred feet from the track, is admissible, in rebuttal of evidence by the company that it used the most approved apparatus for the arrest of sparks.⁶

§ 50 *e.* In an action for damages resulting from two fires — one in February and the other in July — lit by sparks, although it appeared that the company used defective engines, still, it being proved that the son and servant of the plaintiff saw the July fire and could have extinguished it, but did not; held, in regard to the July fire, the parties were *in pari delicto*, and the plaintiff ought not to recover.⁷

§ 50 *f.* In an action against a railroad, for damage to the plaintiffs' warehouse by sparks, the court instructed the jury, that, if the plaintiffs had been guilty of negligence in leaving their property in an exposed condition, in a warehouse near to the railroad, with combustible matter in it likely to take fire from sparks emitted from the engine, and in carelessly leaving the building in such a condition that the sparks might enter and come in contact with the combustible matter, then they should find for the defendant, unless the defendant was guilty of gross negligence in not having used the precaution in applying to its engines the best known means of

¹ Illinois v. Mills, 42 Ill. 407.

² Frankford v. Philadelphia, 54 Penn.

345.

³ St. Louis v. Gilham, 39 Ill. 455.

⁴ St. Louis v. Montgomery, 39 Ill. 335.

⁵ Illinois v. Mills, 42 Ill. 407.

⁶ Illinois v. McLelland, 42 Ill. 355.

⁷ Ibid.

preventing the escape of fire, or in the manner of running its engine. Held correct.¹

§ 50 *g*. Under the (Miss.) act of Dec. 9, 1863, a railroad cannot by special contract provide against responsibility for losses by fire.²

§ 50 *h*. Under Mass. Gen. Sts. c. 63, § 101, if a spark from a locomotive sets fire to grass near the track, and the fire spreads across the land of different parties, in a direct line and without any break, to the plaintiff's property, the railroad is liable. In case of fire set to grass which spread to property of the plaintiff, he is not debarred from recovering by the fact, that back-fires were kindled in good faith, and were judicious though ineffectual means of staying the fire, and were swallowed up in the wave of advancing flames, which went thence and destroyed the plaintiff's property.³

§ 50 *i*. Where by statute a railroad is authorized to *insure*, it is liable for remote loss.⁴ And where the statute provides that the railroad shall have an insurable interest in the property for which it may be responsible, this applies to personal property, although there was no notice or reasonable cause to believe that such property was in danger.⁵

§ 51. If an injury is caused by coming in contact with an animal, which might have been seen early enough to stop the train; and if the train was going unreasonably fast, and no signal given, nor attempt made to arrest the speed; the company is liable.⁶

§ 52. A railroad is bound to slacken speed at a turnout, and to give warning when approaching a crossing.⁷

§ 53. If a collision is caused by misplacement of the rails; the company is liable therefor. It is bound to show that the rails were rightly placed, and cannot trust exclusively to the lever of the switch, when the rails were in open view while moving it. It is also bound to have the rails firmly secured. The right placing of the switch is not conclusive of due care; but the question is for the jury.⁸

¹ Great v. Haworth, 39 Ill. 346.

² Mobile v. Franks, 41 Miss. 494.

³ Perley v. Eastern, 90 Mass. 414.

⁴ Hooksett v. Concord, 38 N. H. 242.

⁵ Ross v. Boston, 6 Allen, 87. See, further, Sheldon v. Hudson, 29 Barb. 226; Piggot v. Eastern, 3 Com. B. 229; Bass v. Chicago, 28 Ill. 9; Lyman v. Boston, 4 Cush. 288; Aldridge v. Great, 3 Man. & Gr. 515; Baltimore v. Woodruff, 4 Md. 242; Huyett v. Philadelphia, 23

Penn. 373; Hart v. Western, 13 Met. 99; Chapman v. Atlantic, 37 Me. 92.

⁶ N. & C. Railway v. Messino, 1 Sneed, 220.

⁷ Murray v. South Carolina, &c., 10 Rich. 227.

⁸ Curtiss v. Rochester, &c., 20 Barb. 282. See Illinois v. Baches, 55 Ill. 379; Tinney v. Boston, 62 Barb. 218; Baulec v. New York, 5 Lans. 436.

§ 53 *a*. A railroad is not responsible for misplacement of a switch, unless shown to be done by an employee.¹

§ 54. In an action against a railroad for passing through the plaintiff's land, he may recover damages upon the ground that his cattle have been thereby prevented from thriving.²

§ 54 *a*. Neglect to *ring* or *whistle* at a crossing does not give a right of action to one injured in part by his own neglect.³ But a railroad is liable to a passenger for an injury inflicted through its backing the train without whistling or ringing the bell when he was leaving the cars at his destination.⁴ So where, at a crossing, travellers can neither see nor distinctly hear a train; notwithstanding the sounding of a bell and whistle.⁵

§ 54 *b*. Where a railroad made a crossing over the rails and suffered the public to use it as a highway, although the land was not subject to any right of way, and stationed a flagman there; held, damages might be recovered by one, who, using due care, was induced to cross by a signal carelessly made by the flagman, and was injured by a collision caused thereby.⁶

§ 54 *c*. If, when a station room is intolerably offensive by reason of tobacco smoke, a passenger attempt to enter the cars as soon as possible, with proper care and violating no regulation of the company, and if he receive an injury, in so doing, from the unsafe condition of the platform or the steps in a place where passengers would naturally go; the company will be held liable.⁷ Otherwise if a railroad designates and sets apart a platform as the place where it requires all passengers to enter the cars, and this is known to a passenger, and if he in advance of time and without justification seeks to enter the cars at another place.⁷

§ 54 *d*. A railroad is liable to a hackman injured by a defect in the platform, though in the highway.⁸

§ 54 *e*. The omission by a railway to fasten a gate at a crossing when closed on the approach of a train, the gate being usually, but not invariably, fastened at such times, is not actionable negligence.⁹

¹ Tinney v. Boston, 62 Barb.; Law Reg., Nov. 1872, p. 723.

² Baltimore, &c. v. Thompson, 10 Md. 76.

³ Gorton v. Erie, 45 N. Y. 660. See Galena v. Appleby, 28 Ill. 283; Renwick v. N. Y., 36 N. Y. 132; Beisiegel v. N. Y., 34 N. Y. 622; p. 354.

⁴ Imhoff v. Chicago, 22 Wis. 681.

⁵ Richardson v. New York, 45 N. Y. 846.

⁶ Sweeny v. Old Colony, 10 Allen, 368.

⁷ McDonald v. Chicago, 26 Iowa, 124.

⁸ Tobin v. Portland, 11 Am. Law Reg. 597.

⁹ Shelton v. London, L. R. 2 C. P. 631.

§ 55. Under a statute, providing that a bell shall be placed on each locomotive engine, and be rung at the distance of at least eighty rods from the place where the railroad shall cross any travelled public road or street, &c., under a penalty of twenty dollars for every neglect of this provision; a railroad company incurs the penalty as often as it crosses a public road, &c., without giving the required signal. And the section applies as well to cases where the railroad crosses the highway by a bridge at a sufficient elevation to allow travel to pass beneath, as to the case of a crossing on a level.¹

§ 56. A railroad is not liable for damage caused by the accumulation of snow on the side of a fence, which they erect upon their land, to keep the snow from the road.²

§ 57. A railroad, condemned to pay for land, the owner reserving the minerals, is not liable to the land-owner on account of his inability to work a mine, discovered under the road. The road takes an implied right of support, for its contemplated purpose, in the adjacent as well as subjacent land.³

§ 58. Where the right of way is granted to a railroad company, and the company are obliged to make a deep cut in order to enjoy the right, they are not bound to build walls to prevent the falling in of the banks.⁴

§ 59. A railroad may exclude persons from their grounds, having no business there connected with the company; and may make rules and by-laws for this end.⁵

§ 60. In the construction of bridges and embankments, where an accident would be accompanied with more than ordinary danger to passengers, it is the duty of a railroad to erect fences or walls, or otherwise to provide necessary and appropriate safeguards.⁶

§ 61. A railroad constructing a bridge over a cut in a highway through which the railroad passes, and keeping the bridge and its abutments in repair under Mass. Rev. Sts. c. 39, § 72, is bound to keep in repair the entire distance of the excavation made in crossing the highway as approaches to the bridge. And a verdict, in favor of one injured within that line by reason of a defect in the

¹ *People v. New York, &c.*, 25 Barb. 199. See *Chicago v. Triplett*, 38 Ill. 482; p. 353.

² *Carson v. Western, &c.*, 20 Law Rep. 350, Mass. S. J. C.

³ *Caledonian, &c. v. Sprot*, 39 Eng. L. & Eq. 16.

⁴ *Hortsman v. Covington, &c.*, 18 B. Monr. 218.

⁵ *Barker v. Midland, &c.*, 36 Eng. L. & Eq. 253; 7 Met. 596.

⁶ *Hanley v. Harlem*, 1 Edm. (N. Y.) Sel. Cas. 359.

fence, will not be set aside, because the jury were instructed that the company were bound to repair not only "the bridge proper and the abutments, but all that part of the crossing which is between the bridge proper and the line of the location of the road," especially if the accident occurred in that half of the fence nearest to the abutment.¹

§ 62. Where a railroad is bound to keep in repair a railing approaching a bridge, and an injury happens by reason of the fright of a horse, though without any one's fault, and its running against and breaking through such fence; the company is liable, if the fence was insufficient and out of repair, and the accident would not have occurred if it had been in proper repair.²

§ 63. In an action against a railroad for injury to a child by being run over by a train, evidence is incompetent for the purpose of proving negligence in the defendant, that the cars were daily run without a guard at the rear of the train over the *Y*, which was so situated that the engineer could not see the rear.³ (a)

¹ *Titcomb v. Fitchburg*, 12 Allen, 254.

² *Ibid.*

³ *Bannon v. Baltimore*, 24 Md. 108.

(a) As to the restrictions imposed by law upon railroads in regard to *uniformity of charges*, see *Finnie v. Glasgow, &c.*, 34 Eng. L. & Eq. 11; *Baxendale v. North, &c.*, 30 Law Times, 134; *Ransome v. Eastern, &c.*, 31 Ib. 72; 36 (2 N. S.) 376; *Harris v. C. & W. Railw.*, 30 Ib. 273; *Baxendale v. Eastern, &c.*, Ib. 320.

In reference to platforms and *depots*, see *Whitney v. Chicago*, 27 Wis. 327; *Memphis v. Whitfield*, 44 Miss. 466; *Orange v. Placide*, 35 Md. 315.

As to the places of stopping trains, *Memphis v. Whitfield*, 44 Miss. 466.

Sec. 3320 of the (Geo.) Code, declaring that "all railroad companies shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents, or employees, in or by the running of the cars, or engines, for the purpose of recovering damages for such injury," includes *hand-cars*. *Thomas v. Georgia*, 38 Geo. 222.

CHAPTER XXXVII.

CORPORATIONS; TOWNS; LIABILITY FOR DEFECTIVE HIGHWAYS.

1. Municipal corporations; counties; towns; liability for *highways*; statute and common law; *parties and uses*, as connected with liability; indictment.

3. For what roads a town, &c., is responsible; *laying out*, use, &c.

4. *Safe and convenient*, meaning of the terms; what constitutes a *defect* or *obstruction*; a question for the jury.

7. Snow and frost.

8. Want of lights, guards, railings, &c.

9. Sidewalks.

10. Notice of defect; implied notice.

11. The plaintiff must not have been himself in fault; concurring or *primary* causes; defect of vehicle, &c.

18. Nature and proof of the injury.

19. Liability of a town, as affected by that of other parties; injuries caused by railroads, &c.

21. General nature of the action; pleadings, &c.

§ 1. THE corporations, to which we have for the most part referred in the preceding chapters, are those instituted for purposes of *trade* or *business*, and usually acting under express charters or acts of incorporation. It remains to speak of another class, sometimes called *quasi-corporations*. This term is said to be applied to such bodies or municipal societies, which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law.¹ Our plan, however, requires us to notice only one of this class of corporations, to wit, towns or cities; and these almost wholly with reference to one form of liability — that arising from injuries caused by *defective roads or highways*. (*a*)

¹ Bouv. Law Dict.

(*a*) See *Hodge v. Bennington*, 11 Am. Law Reg. 50; *Bronson v. Southbury*, 37 Conn. 199; *Parker v. Macon*, 39 Geo. 725; *Munson v. Derby*, 37 Conn. 298.

In Wisconsin, a city is held liable. *Kittredge v. Milwaukee*, 26 Wis. 46.

A city may be constitutionally exempted from this liability by statute. *O'Harra v. Portland*, 3 Oreg. 525. See *Roll v. City*, 34 Geo. 326; *Philadelphia v. Com.*, 52 Penn. 451.

In reference to the liability of *counties*, see *Carroll v. Board*, &c., 28 Miss. 38; *County, &c. v. Hosford*, 11 Ill. 170; *Adams v. Logan*, Ib. 336; *County, &c. v. Steele*, 31 Ill. 543; *Brown v. Jefferson*,

&c., 16 Iowa, 339; *Crowell v. Sonoma*, &c., 25 Cal. 313; *White v. Bond*, 58 Ill. 297.

In California, the right to sue a county is not limited to cases of tort, malfeasance, &c., but is given in every case of account, after presentation to, and rejection by, the board of supervisors. *Price v. Sacramento*, 6 Cal. 254.

A county is not liable in tort, for the personal misconduct or negligence of the county commissioners, while in the performance of their official functions. *Board, &c. v. Mighels*, 7 Ohio, 109.

A county is not liable for damages recovered against the sheriff, for the escape

§ 2. The civil liability of municipal corporations, for injuries sustained in consequence of defects in highways, is held to be dependent upon express statutes, which have been enacted in some of the States; and does not exist at common law.¹ (a) And the only remedy is the remedy afforded by statute; the application of which depends upon the terms and conditions provided in such statute.² The question of *negligence* on the part of the town does not

¹ *Mower v. Leicester*, 9 Mass. 247; *Bassell v. Steuben*, 57 Ill. 55; *Spear v. Cummings*, 23 Pick. 226. See *Ball v. Winchester*, 32 N. H. 435; *Batty v. Duxbury*, 24 Vt. 155; *Hopple v. Brown, &c.*, 13 Ohio St. 324; *Hull v. Richmond*, 2

W. & M. 337; *King v. Police, &c.*, 12 La. Ann. 858; *Nebraska v. Campbell*, 2 Black, 590; *Browning v. Springfield*, 17 Ill. 143.

² *Brady v. Lowell*, 3 Cush. 121.

of a debtor on account of the insufficiency of the jail. *Haygood v. Justices*, 20 Geo. 845.

In Maryland, county commissioners are held liable for a defective highway, notwithstanding the statute which allows a party injured to bring an action upon the bond of the road supervisor. *County v. Gibson*, 36 Md.; *Am. Law Reg.*, April, 1873, p. 255.

See *Dale v. Gunter*, 46 Ala. 118; *Jacobs v. Hamilton*, 1 Bond, 500; *Granger v. Pulaski*, 26 Ark. 37; *Walter v. Wicomoco*, 35 Md. 385; *McCalla v. Multnomah*, 3 Oreg. 424; *Covington v. Kinney*, 45 Ala. 176; *Scales v. Chattahoochee*, 41 Geo. 225; *Humphreys v. Armstrong*, 3 Brewst. 49; *Armstrong v. Clarion*, 66 Penn. 218.

The distinction is made, in Illinois, that townships, incorporated like counties as mere civil divisions of the State, not, like cities and villages, for their own benefit and by their assent, are not liable to a suit for damages for defective highways. *Waltham v. Kemper*, 55 Ill. 346.

(a) In New York, it has been held that there is no obligation, either by statute or common law, upon towns, to keep in repair highways within their limits; nor will an action lie against a town to recover damages for an injury occasioned by a defect in the highway. *Morey v. Newfane*, 8 Barb. 645.

When the streets of the city of New York are out of repair, through act or neglect of the corporation, it is liable for injury thereby sustained. *Davenport v. Ruckman*, 37 N. Y. 568.

Where the trustees of a village or common council of a city are by statute made commissioners of highways, the corporation is liable for their neglect to make proper repairs. *Clerk v. Lockport*, 49 Barb. 580.

The act of 1862, c. 63, § 39, providing that the city of Brooklyn shall not be liable for the nonfeasance or misfeasance of certain of its officers, such officers not being subject to removal by the city government, is constitutional, and a defence to the city in actions arising from non-repair of public streets or public wharves. *Gray v. Brooklyn*, 50 Barb. 365.

Where liability for defective highways is imposed by statute, it is held that there is no necessary privity between the traveller and any one but the towns, as to the sufficiency of the highways. The towns must look to those who obstruct their highways for redress. *Willard v. Newbury*, 22 Vt. 458.

Where it was provided in the charter of a borough, that it should "keep in repair all the highways which were opened and within the limits of said borough;" and also directed, that at stated periods thereafter there should be an apportionment, according to the assessment list of the borough and the town, of the highways in said town, and without the limits of said borough: held, such provision referred only to the ordinary highways which the town was then bound to maintain. *McGowan v. Windham*, 25 Conn. 86. See *Penn. v. Graham*, 63 Penn. 290; *Hover v. Barkhoof*, 44 N. Y. 113.

As to indictments for defective roads, see *State v. Bangor*, 41 Me. 533; *Sanders v. State*, 18 Ark. 198; *Maine Rev. Sts.* 1841, c. 25.

A refusal to rule in an action against a town for a defective highway, that the defect must be of such a nature that the town would have been liable to indictment therefor, is not open to exception. *Goldthwait v. East, &c.*, 5 Gray, 61.

arise in such case, except incidentally, as involved in the question whether the obstruction, insufficiency, or want of repair exists; and this may depend upon the manner in which the defect originated, and the circumstances of its continuance. In such case, the question of negligence is a material inquiry.¹ On the other hand, so long as the public highways are kept by towns in a condition safe and convenient for travel, they fulfil all the duty required of them by the laws of the State. Thus if, from neglect to repair a culvert, the water of a stream is cast back on the land of individuals above the road, the town is liable, if at all, only at common law. If the culvert is obstructed by a mere wrong-doer, the town is not liable either by statute or common law.² So, notwithstanding the statutory liability for injuries caused by defective highways, an action cannot be maintained against a town, for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from travelling on the road, with his cattle and teams, and on foot, and from transporting his logs and timber to a saw-mill, and from otherwise working in his wood-lot, and about his logs and wood.³ Nor for the obstruction of a highway by snow, negligently suffered to remain thereon, by reason whereof the plaintiff was prevented from passing over the same with his horses and sleigh, and was put to great trouble, expense, and loss of time in extricating them from the snow.⁴ So an owner of land, prevented from a convenient access thereto by a defect in the highway, cannot maintain an action against the town, liable to keep such highway in repair.⁵ But it is no excuse for a city, when an injury is sustained by the streets being out of repair, to allege that there was no money in the treasury by which the repairs could be made.⁶ So a city is responsible for any injury resulting from a neglect to keep the streets in repair, whether the neglect is wilful or otherwise.⁷ (a)

¹ *Johnson v. Haverhill*, 35 N. H. 74.

² *Peck v. Ellsworth*, 36 Me. 393.

³ *Holman v. Townsend*, 13 Met. 297.

⁴ *Brailey v. Southborough*, 6 Cush.

141.

⁵ *Smith v. Dedham*, 8 Cush. 522.

⁶ *Erie City v. Schwingle*, 22 Penn. 384.

⁷ See *Hutson v. New York*, 5 Sandf. 289.

⁷ *Erie City v. Schwingle*, 22 Penn. 384.

(a) Companies receiving toll from passengers, upon roads laid out and kept up by them, are responsible for damages resulting from want of repair. And when a highway is superseded by a plank-road laid upon it, the town is not responsible

for its defects. *Davis v. Lamoille, &c.*, 1 Williams, 602.

Towns are responsible for damages resulting from a want of reasonable repair in a *pent road*, taking into consideration its character and importance. *Loveland v. Berlin*, 1 Williams, 718.

§ 2 *a*. With regard to the *mode of use* of a highway, which will render the town liable for a defect or obstruction, and the parties who may maintain an action for injury thereby occasioned; it is only those who are using the road for legitimate purposes, in the usual and ordinary mode, that can claim indemnity of a town for injuries caused solely by defects in the highway, or by the combined effect of such defects and pure accident. Hence a traveller, who stops and ties his horse outside of the limits of the highway, though using due care, cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town.¹ Otherwise with a traveller who merely stops to pick berries.²

§ 2 *b*. Any part of the highway may be used by the traveller, provided he therein conforms to all laws and well-settled rules connected with such use; children are not restricted in passing and re-passing upon the streets and roads, more than adults. Safety and convenience for travellers, their horses and vehicles, are the rule by which it is to be determined, whether there be any defect or want of repair, or sufficient railing upon highways. The public have no right in a highway, except to pass and repass thereon. When children appropriate a part of the road for their sports, the town or city is not responsible for injuries received by them through a defect in the road.³ A boy eleven years of age cannot maintain an action against a city, for an injury caused by catching his foot between the planks of a sidewalk, while playing on such sidewalk.⁴ A fireman has no such relation to the city as to prevent his maintaining an action.⁵

§ 3. With regard to the establishment or *laying out* of a highway, necessary to make a town or city liable for any defect therein; although a road is used as a town-way, yet in an action against the town, on account of an injury sustained from a defect in the way, the town may show that the road was not duly laid out and accepted as a town-way.⁶ (*a*) Thus by Stat. 1803, c. 111, annex-

¹ Richards v. Enfield, 13 Gray, 344.
See Sykes v. Pawlet, 43 Vt. 446.

² Britton v. Cumington, 107 Mass. 347.

³ Stinson v. Gardiner, 42 Me. 248;
Sykes v. Pawlet, 11 Am. Law Reg. 59.

See Morristown v. Moyer, 11 Am. Law Reg. 199.

⁴ Blodgett v. Boston, 8 Allen, 237.

⁵ Palmer v. Portsmouth, 43 N. H. 265.

⁶ Jones v. Andover, 9 Pick. 146.

(*a*) If the public have no means of access, and no occasion, by and upon which they can use a new highway, it is no nuisance for the town not to build and keep it

in repair. State v. Rye, 35 N. H. 368.
See Com. v. Holliston, 107 Mass. 232;
Oliver v. Worcester, 102 Mass. 489.

ing to Boston that part of Dorchester now known as South Boston, the selectmen of Boston were authorized to lay out such streets, in South Boston, as in their judgment would be for the common benefit of the proprietors of the land, and of the town of Boston; provided, that no compensation should be allowed the proprietors for such streets as should be laid out within twelve months from the passing of the act; and provided, also, that the town of Boston should not be obliged to complete the streets so laid out, sooner than they might deem it expedient. In pursuance of this authority, the selectmen, within the twelve months, laid out various streets over the entire territory of South Boston, and among others a very long street, denominated Second Street, which subsequently became distinguished in two parts, namely, Second Street East, and Second Street West, or Dorchester Street. The mayor and aldermen, in 1831, adopted an order that Second Street west of Dorchester Street should be made passable, and subsequently passed orders, in 1834 and 1836, appointing committees to "cause Second Street, at South Boston, to be repaired and put in good order," and "to be properly graded and gravelled;" in pursuance of which, that part of Second Street, known as Second Street West, had been completed and used as a highway; but no part of Second Street East, though occasionally used as a highway, had ever been ordered to be completed and made passable, unless included in the above orders. In an action against the city of Boston, to recover damages for an injury occasioned by a defect in Second Street East, it was held, that, in order to render the defendants liable, it was not sufficient to prove, that the way complained of had been so travelled and used as to become a highway *de facto*, but that it must appear, not only that such way has been laid out, but that the mayor and aldermen, by an official act, had determined upon its completion, that is, when the same should be graded, fitted for travel, and opened for use; and that the orders above mentioned related only to Second Street West.¹ So, where the owners of land in a city open and dedicate it to public use, as a footway, placing a fence across it, which allows foot-passengers to pass, but is dangerous to horses and carriages; the city, whether they have accepted the way or not, are not liable for an injury occasioned by the fence to a horse and carriage, though driven with ordinary care and skill.² So, if an incorpo-

¹ *Bowman v. Boston*, 5 Cush. 1. See *Hobart v. Plymouth*, 100 Mass. 159; *Mayberry v. Standish*, 56 Me. 342.

² *Hemphill v. Boston*, 8 Cush. 195.

rated company within the limits of a town lay out a road and dedicate it to the public use, the town will not thereby become liable to repair it, unless it has in some way accepted or adopted it as a way.¹ (a)

§ 3 a. A town is bound to keep in repair a highway over a drain.² But an action was held not to lie, where there was a passage-way, within the limits of the road, leading round to a watering-trough, and then re-entering the road, and, while leaving the trough, a wheel ran upon a rock lying in its original place.³ And the licensing of a circus does not require the city to furnish a safe and convenient access, nor render it liable for defects in any way adopted by the circus or by individuals.⁴ The liability of a city extends to an alley connected with the street.⁵

§ 3 b. The liability of a town is not to be varied according to its wealth or poverty. The question of ability, to build and keep in repair a given highway, is to be considered by the proper tribunal, in laying out an original highway; but their finding upon that point is conclusive, and remains so until the highway is discontinued. Such question cannot be raised and tried collaterally in a suit for injuries received in consequence of a defect in the highway.⁶ And in an action against a town for an injury sustained in consequence of a defect in a highway, a declaration, that the way was "a town-way or road leading, &c., which road" it was the duty of the town to maintain, is supported by evidence, that it was an *ancient* road or way used by the public and the

¹ Bryant v. Biddeford, 39 Me. 193.

² Champaign v. Patterson, 50 Ill. 61.

³ Hall v. Unity, 57 Me. 129.

⁴ Morgan v. Hallowell, 57 Me. 375.

⁵ Requa v. Rochester, 45 N. Y. 129.

⁶ Winship v. Enfield, 42 N. H. 197.

(a) Weare v. Fitchburg. — This was an action of tort, brought by Augusta Ann Weare, in which she sought to recover damages for alleged injuries received while travelling on Milk Street, in Fitchburg. It appeared in plaintiff's evidence that Milk Street was thirty feet wide; that the middle of the road was prepared and wrought out by the town for a carriage way; that on the westerly side there was a slight depression which served as a watercourse; that since 1867 there had been between the watercourse and the westerly line of the street a smooth foot-way maintained by the town; that at the time of the accident there was on the foot-way a large stone which had been placed there a year previous, and that plaintiff, hastening to her

house, stumbled and fell over the stone. Upon this state of evidence the judge of the Superior Court ruled that the plaintiff could not maintain her action, on the ground that the place where the injury happened was not a part of the street that the town was bound to keep in repair. The exceptions taken to the ruling were sustained, and a new trial was granted by the Supreme Court, the court saying, "The question whether the sidewalk being within the limits of the way as laid out on record, was recognized and adopted by the town, by acquiescence and long-continued public use, as a part of the travelled portion of the way, should have been submitted to the jury." Worcester Spy, April 5, 1873.

town, and kept in repair by the town.¹ So the use of a road for more than twenty years is evidence of its being a public highway, especially if it has been yearly repaired during that time, and included within the limits of surveyors' warrants. And its width, in such case, where it is not fenced out on both sides as a road, will extend the usual distance each side from the travelled path.² And it seems, that, if a town, in making a county road, deviate from the true location, they are estopped, in an action against them for an injury occasioned by its being out of repair, to deny their liability to maintain it as they have made it.³ So the erection and support of a bridge by a town, and the use of it by the public for thirty-eight years, are sufficient proof of its existence as a highway, on the presumption of a laying out, a grant, or a dedication, to render the town liable for an injury occasioned by its being out of repair.⁴ So a way is sufficiently shown to be a highway, by proof that it has been known and used as a highway for forty years, and during that time has been repaired by the town.⁵ So a city is liable for defects in one of its highways, after it is built and opened to the public, though the time allowed for its construction after acceptance had not elapsed, if the city had reasonable notice of the defects.⁶ So a town becomes responsible for an injury occasioned by a defect in a highway, from the time when the way is opened for public travel. And evidence that a road has been paid for by order of the commissioners (the tribunal for laying it out), and in fact travelled since it was left by them as finished, is admissible against the town, to prove that the road had been opened for public use, and accepted and adopted by the town.⁷

§ 4. Where any liability upon this subject is imposed by statute, it is, in general, only required of towns to keep their roads in such state of repair, as to be *safe and convenient*, without defining what imperfections would constitute a ground of action. (a) Whether a

¹ Stedman v. Southbridge, 17 Pick. 162. See State v. Sartor, 2 Strobb. 60; Calder v. Chapman, 8 Barr, 522.

² Hull v. Richmond, 2 W. & M. 337.

³ Williams v. Cummington, 18 Pick. 312.

⁴ Ibid.

⁵ Reed v. Northfield, 13 Pick. 94.

⁶ Blaisdell v. Portland, 39 Me. 113.

⁷ Bliss v. Deerfield, 13 Pick. 102. See Leavenworth v. Laing, 6 Kans. 274.

(a) See p. 365, n. "Defect or want of repair" is the language of the statute in Massachusetts. Rev. Sts. 246. See Gen. Sts.

Similar terms are used in other States.

In Maine, "safe and convenient" is the statutory requisite.

The liability of towns is sometimes held to require them, after having reasonable notice of the existence of obstruc-

road is in such a condition or not, is a question for the jury under the instructions of the court.¹ Thus it cannot be determined by the court, *as matter of law*, that a stick of wood of given dimensions, and which had been lying upon the highway for a specified time, was or was not an obstruction.² So it is for the jury to find, whether timber, wood, lumber, or other materials placed within the limits of a highway, by any person, are, under the circumstances, to be regarded as obstructions or incumbrances.³ So as to a piece of gas-apparatus, fixed in a city sidewalk, over which a passenger falls.⁴ So although the public rights in a highway are paramount, yet the owner of the fee in the soil, subject to the easement, may make such use of his land within the limits of the highway, for the placing of lumber, &c., as is, under all the circumstances, reasonable and proper. And it is a question for the jury, whether a pile of lumber, within the limits of a highway, but entirely out of the travelled track, from being liable to frighten horses or otherwise, is an incumbrance or obstruction; or whether it has become such by being continued there for an unreasonable length of time.⁵ So a town is liable for an injury to an elephant driven with due care, if in the opinion of the jury an elephant, at the time and place and under the circumstances of the accident, was an animal which it was reasonably proper to take over a highway kept for the reasonable use of the public.⁶ The question is to be determined by the jury, upon a view of all the facts, in reference to the nature and extent of the defect, the character of the ground, the amount and kind of travel, the ability and means of the town,

¹ Britton v. Cummington, 107 Mass. 547; Lyman v. Amherst, 107 Mass. 339; Wheeler v. Westport, (Wis.) Am. Law Reg., Feb. 1873, p. 122; Hume v. New York, 47 N. Y. 639; Moody v. Osgood, 60 Barb. 644; Merrill v. Hampden, 26 Me.

234; 37 Ib. 250; 17 How. 161; 35 N. H. 74.

² Johnson v. Haverhill, 35 N. H. 74.

³ Winship v. Enfield, 42 N. H. 197.

⁴ Loan v. Boston, 106 Mass. 450.

⁵ Chamberlain v. Enfield, 43 N. H. 356.

⁶ Gregory v. Adams, 14 Gray, 242.

tions in their highways, to remove them, or make safe by-ways to pass around them, or to see that they are properly made by others. Batty v. Duxbury, 24 Vt. 155. See Rice v. Montpelier, 19 Ib. 470.

In an action against a town to recover damages for an injury occasioned by a defect in a highway, it is no justification that such defect existed in the road as it was left by the commissioners. Bliss v. Deerfield, 13 Pick. 102.

It has been held, that for any indictable obstruction an action may also be maintained by a party injured. Hutson v.

New York, 5 Sandf. 280. See Thornton v. Springer, 5 Tex. 587; West v. Brockport, 16 N. Y. 161.

In late cases an actionable defect has been held to consist in the excessive depth of ruts, breaking the axle, throwing out the traveller, and causing the horse to run, so that he plunged into a ditch and was killed, the whole constituting a single injury. Hodge v. Bennington, 43 Vt. 450. So with objects out of the travelled path, which frighten a horse. Bartlett v. Hooksett, 48 N. H. 18; Foshay v. Glen, 25 Wis. 288.

and other like circumstances, tending to show whether the highway was or not reasonably safe and convenient for the customary travel, and whether or not it ought to have been repaired before the accident.¹ But a jury cannot infer, from the mere existence of a road, that it was *wide enough* to be safe and convenient.² Nor on the other hand are the jury to infer a defect in a highway at a particular time and place, merely from the fact that an injury was sustained at that time and place; but they may take that fact into consideration, in connection with the other facts in the case. The terms "safe and convenient," as applied in the statute, do not mean *entirely* safe, and *entirely* convenient, but are to be considered by the jury, according to their knowledge and experience, in the ordinary transactions of men, in their usually accepted meaning. It is proper for the jury to take into consideration the nature of the business in the town, in connection with other facts in the case, and with the obligation of the town to keep the highway in repair for the use of the inhabitants of other towns, as well as of its own inhabitants.³ So the nature of the country, whether rough and hilly, or smooth; the amount of travel; the places near, on which carriages could be turned out; and the ordinary care exercised usually by towns on this subject; must fix whether the town was guilty, in the case at bar, of culpable neglect or not.⁴ (a)

§ 5. The jury were rightly instructed, in an action against a town for defects in the highway, that there may be localities, where it is the duty of the town to make the street safe for travel, over the whole width laid out.⁵ So, in an action against a city, the judge instructed the jury, among other things, that what was a

¹ Johnson v. Haverhill, 35 N. H. 74; Wheeler v. Westport, (Wis.) Am. Law Reg., Feb. 1873, p. 122.

² Hunt v. Rich, 38 Me. 195.

³ Church v. Cherryfield, 33 Me. 460. See Champaign v. Patterson, 50 Ill. 61.

⁴ Hull v. Richmond, 2 W. & M. 337.

⁵ Bryant v. Biddeford, 39 Me. 193.

(a) A defect or want of repairs is either inert matter left incumbering the street upon or over it, or structural defects, endangering the public travel. Davis v. Bangor, 42 Me. 522. See p. 362.

In some cases, the court rules, as matter of law, that the alleged cause of injury is not an actionable obstruction. Thus a large vehicle, used as a *daguerrean saloon*, standing partly within the limits of a highway, but outside of and several feet from the travelled path, is held not a *defect* which will entitle a traveller to damages, if his horse, while driven by himself, is frightened thereby, and becomes unmanageable, and runs for some distance, and

upon an embankment, so that the carriage is broken, and himself thrown upon the ground and injured. Keith v. Easton, 2 Allen, 552. See Morse v. Richmond, 41 Vt. 435.

A team temporarily standing, under the charge of the owner or driver, is not a *defect or obstruction*. Davis v. Bangor, 42 Me. 522.

It is a question for the jury, whether an object permanently placed, temporarily left, or slowly moving, in a highway, is a nuisance; or, in other words, whether it unnecessarily obstructs the free passage of the public. Graves v. Shattuck, 35 N. H. 257.

defect in a highway, which would render a town or city liable, was a "practical question to be determined by the jury in view of the circumstances of each particular case," and added, by way of illustration, "that a different state of repair would be required in a city, where a large amount and variety of travel was constantly passing, than in a country place, where the state of things in this respect was different." Held, that, understanding the term "city" to be used to designate a closely built and thickly settled place, with a great amount and variety of travel, as distinguished from a place of an opposite character, through which there was little travel; the illustration was a proper comment on the law, and not likely to mislead the jury.¹ So, whether obstructions in a highway render it unsafe, though the obstructions are not in the travelled part, is a question for the jury; and the width of the way may be an essential element in determining this question.² So lumber, wood, and other materials, when placed within the limits of a highway, in such a place, or in such a form and position, as to be likely to frighten horses, may be an incumbrance, even though entirely out of the travelled track, and not upon any part of the road bed. But not if the person placing or continuing such materials upon the highway was, at the time and in the performance of those acts, making such use of the highway as was, under all the circumstances of the case, necessary and proper.³

§ 6. And, in general, towns are not obliged to keep *the whole* of a highway, from one boundary to the other, free from obstructions, and fit for the use of travellers. (a) Thus, where the travelled part of a highway was raised with a gutter on each side, and beyond the gutter on one side, and nearly eight feet from the travelled path, were large loose stones which occasioned an injury to a traveller's horse; it was held that the town was not answerable.⁴ So a town is not bound to make the sides of all its roads passable with wheels, with safety and convenience; but it must have so much of them passable, as not to delay travellers, or endanger them, in getting by at places not very remote or very inconvenient.⁵ So, in a highway running east and west, the wrought path was

¹ *Fitz v. Boston*, 4 Cush. 365.

² *Hull v. Richmond*, 2 W. & M. 337.

³ *Winship v. Enfield*, 42 N. H. 197.

⁴ *Howard v. N. Bridgewater*, 16 Pick.

189; 35 N. H. 303. See *Jaquith v. Richardson*, 8 Met. 213; *Davis v. Dudley*, 4 Allen, 557.

⁵ *Hull v. Richmond*, 2 W. & M. 337.

(a) In general, *foot-passengers*, in reference to carriages, may use the carriage-way. *Coombs v. Purrington*, 42 Me. 332.

changed from the south to the north side of the space between the limits of the highway, leaving a steep descent between the new and the old wrought path; and the old path ceased to be a part of the wrought or travelled pathway. At a right angle with the highway, and running therefrom southerly, was a road leading to the house of A, which road on a certain day was wholly obstructed by snow; and there was, on the same day, a private pathway made by A, across his fields, from his house to that part of the highway, where the wrought and travelled path had been thus changed. While the road was thus obstructed, A, knowing all the facts, was travelling in a sleigh along the newly wrought and travelled path, and turned his horse southerly, for the purpose of entering upon the private pathway, and, in passing down the descent between the new and the old wrought and travelled path, his sleigh was upset, and he received an injury. Held, he could not maintain an action against the town.¹ But where there is conflicting evidence, as to the condition of the road, and the prudence exercised by the plaintiff, it is error for the court to charge the jury, as a matter of law, that the defendants are entitled to a verdict, if the travelled path was well beaten to such a width, that the plaintiff might conveniently have passed at any specified distance from its margin, at which the injury was received.²

§ 6 *a*. No action lies for an injury by water suddenly accumulated in a gutter, unless there is delay in passing.³ But an action lies for an injury caused by the construction of a sewer, intrusted to a contractor.⁴

§ 7. In general, a town is liable for defects and obstructions caused by *snow*.⁵ And the court will not lay it down as a rule of law, that *treading down snow*, so that the street shall not be blocked up or incumbered, is sufficient to exempt the town from liability.⁶ So, if the usually travelled path of a highway is obstructed with snow, and the only way broken out is at the side over a frozen ditch, the town is liable for defects in such way. And the occurrence of a rain and a thaw is sufficient notice to the town of its unsafe condition.⁷ So the defect may consist in holes, caused by the sinking of stones below the surface, through the action of *frost*.⁸ But a city is not liable for ice formed by the

¹ *Shepardson v. Colerain*, 13 Met. 55.

² *Sessions v. Newport*, 23 Vt. 9.

³ *Cook v. Milwaukee*, 24 Wis. 270.

⁴ *Springfield v. LeClaire*, 49 Ill. 476.

⁵ *Loker v. Brookline*, 13 Pick. 343;

Chicago v. Smith, 48 Ill. 107; *Landolt v. Norwich*, 11 Am. Law Reg. 383.

⁶ *Providence v. Clapp*, 17 How. 161.

⁷ *Savage v. Bangor*, 40 Me. 176.

⁸ *Tripp v. Lyman*, 37 Me. 250.

lawful pumping of water by a fire-engine.¹ Nor for the slippery condition of a sidewalk, occasioned by the freezing of snow carried upon the sidewalk and trodden down by the feet of travellers, although, by the location of a street railway close to the sidewalk, a ridge of snow is formed, which makes the snow more liable to be carried upon the sidewalk.²

§ 8. A city or town is held not bound to light its highways.³ (a) But a town is liable for the want of proper *guards or lights*, placed at points where the ways are repairing.⁴ Or, as is held, the want of a rail or barrier, if necessary for the proper security of travellers, and if it would have prevented the injury.⁵ And, although towns are not ordinarily bound to *fence* their roads, they are bound

¹ Cook v. Milwaukee, 27 Wis. 191.

² Nason v. Boston, 14 Allen, 508. See Congdon v. Norwich, 37 Conn. 414; Landott v. Norwich, Ib. 615; Mosey v. Troy, 61 Barb. 580.

³ Randall v. Eastern, 106 Mass. 276.

⁴ Kimball v. Bath, 38 Me. 219. See Worster v. Canal, &c., 16 Pick. 541.

⁵ Palmer v. Andover, 2 Cush. 600. See Rowell v. Rowell, 7 Gray, 100; Tetus v. Northbridge, 97 Mass. 258; Moulton v. Sanford, 51 Me. 127.

(a) With reference to the duty of the traveller on a highway in regard to his own lights, the following case is found in a recent "Standard":—

Court of Queen's Bench, Nov. 4. (Sittings in *Banco* before the Lord Chief Justice and Justices Mellor, Lush, and Hannen.) Foreman and Wife v. The Mayor, &c., of Canterbury. — This was an action for personal injuries tried at the last Maidstone Assizes before Lord Chief Justice Bovill, when the jury returned a verdict for the plaintiff, damages 1100*l*. The plaintiff, who was an auctioneer and builder, residing near Canterbury, was returning from that city with his wife in a light cart. It was a foggy, dark night, and as he was driving along he came in contact with a load of stones, which the defendants had caused to be placed on the road for its repair. He and his wife were thrown out, and the latter received an injury to her wrist and arm, from which it was probable she would never recover. The point involved was one of considerable importance to travellers on public highways.

Mr. Denman, Q. C., now moved to set aside the verdict on the ground of contributory negligence on the part of the plaintiff in driving on a dark night without lamps, misdirection, excessive damages, and that the defendants had a right to place the stones on the road. The learned counsel said there were gas-lights near the spot, and on ordinary occasions the light would be sufficient, but the night in question was very dark and foggy, and

the defendants contended that the plaintiff ought to have provided himself with lamps, the want of which was contributory negligence on his part. The misdirection complained of was, that the learned judge dismissed the point by telling the jury there was no law to compel a man to travel with lights.

Mr. Justice Hannen said that was not misdirection. There was no law to compel a man to use lamps.

Mr. Justice Mellor said lamps were used more for the benefit of other travellers than the person who used them.

Mr. Denman said his contention was, that the jury should have expressed an opinion on the point. All his lordship left to the jury was, whether it was or was not reasonable to leave the stones on the road without a light, or some one to watch the spot. The learned counsel further contended that the defendants were not liable in an action for damages. If they had committed any offence, it was one under the Highway Act, for which they were liable to a penalty of 5*l*.

Mr. Justice Mellor said there would be no rule in respect of contributory negligence. The plaintiff had a right to travel without lights if he pleased, and be able to use the highway without obstruction. The court entertained doubts as to the defendants' liability, and on that point there would be a rule. With regard to the amount of damages being excessive, they would consult the learned judge who tried the case.

Rule granted accordingly.

to erect fences or railings, at places which would otherwise be unsafe or inconvenient for travellers exercising ordinary care.¹ So, although towns are not generally bound to make the whole that is laid out as a highway passable; if an obstruction out of the travelled part renders the road unsafe, the town will be liable, unless they make proper safeguards or railings.² So where a traveller, driving in the night, and exercising due care, by accident drove his carriage to the left over the centre of the travelled path, in consequence of which he came in collision with an approaching carriage, and was forced off a bridge which had no sufficient railing.³ So a traveller, while in the exercise of ordinary care, received an injury, in consequence of driving his wagon against a *post*. It appeared, that the line of the highway was not indicated by any visible objects, and the post was near the true line, and within the limits of the general course and direction of the travel, and rendered the travelling dangerous; that there was nothing to indicate that the post was not within the way intended for public travel; and that the town, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time. Held, the town was liable.⁴ But a town is not liable for an injury sustained by a traveller, while straying outside of the limits of the highway, when the whole highway and the land next adjoining are safe and convenient to travel upon; nor are towns obliged to maintain fences merely to prevent travellers from straying out of the highway.⁵

§ 9. *Sidewalks*, when a part of the public streets, as in the city of Boston, are to be kept in all parts safe and convenient for public use. Thus a sidewalk six and a half feet in width. And this, notwithstanding an act respecting the streets of Boston, and a city ordinance passed in pursuance thereof, authorizing the surveyors of highways to regulate the width and height of sidewalks, and to accept and bind the city to maintain them, when built and relinquished to the city by the abutters.⁶ (a) So in an action for injuries sustained by reason of a fall on a sidewalk, ordinarily used by foot-passengers, occasioned by cutting a ditch in the ice thereon, for

¹ *Collins v. Dorchester*, 6 Cush. 396.

² *Willey v. Portsmouth*, 35 N. H. 303.

³ *Norris v. Litchfield*, 35 N. H. 271.

⁴ *Coggswell v. Lexington*, 4 Cush. 307.

⁵ *Sparhawk v. Salem*, 1 Allen, 30.

⁶ *Bacon v. Boston*, 3 Cush. 174; *Reinhard v. N. Y.*, 2 Daly, 243; *Weisenberg v. Appleton*, 26 Wis. 56; *Rowell v. Williams*, 29 Iowa, 210.

(a) Usage is no defence to an action for a defective sidewalk. *Temperance v. Giles*, 33 N. J. 260.

the purpose of conveying water into a side gutter of the main street of the city : held, the sidewalk was a component part of the highway ; that it was for the jury to determine whether it was in suitable repair ; and that the city was liable, provided the defect was one of which it could reasonably have had knowledge, and the plaintiff in the exercise of due prudence and care.¹ So it is held the duty of cities and towns to keep that part of the street, which lies between the carriage-way and the sidewalk, in such repair, that foot-passengers may cross any part thereof with safety, using reasonable care and caution ; and the establishing of raised crossings at proper distances is not a sufficient compliance with this duty. But the projection of the movable grating of a culvert, from one to two inches above the level of the edge of the sidewalk, against which it rests, is held not a defect, which makes the city responsible for an injury occasioned by stumbling over the grating.² So a city is liable for an injury caused by the fall of an *awning*, projected over a sidewalk by the owner of a building, if dangerous to travellers.³ But not for injury caused by a *post*, though not separated from the road.⁴ Nor for a sidewalk slippery from a smooth surface of snow or ice, without heaps which would endanger one exercising due care.⁵

§ 10. Previous *notice* of the defect or obstruction is usually made an express condition of the town's liability. (a) Thus if an

¹ Hall v. Manchester, 40 N. H. 410.

² Raymond v. Lowell, 6 Cush. 524.
And see Cook v. Milwaukee, 27 Wis. 191 ;
Champaign v. Patterson, 50 Ill. 61 ; Decatur v. Fisher, 53 Ill. 409.

³ Drake v. Lowell, 13 Met. 292.

⁴ Macomber v. Taunton, 100 Mass. 255.

⁵ Cook v. Milwaukee, 24 Wis. 270.

(a) See Ward v. Jefferson, 24 Wis. 342 ; Goodnough v. Oshkosh, Ib. 549 ; Decatur v. Fisher, 53 Ill. 407 ; Ozier v. Hinesburgh, 44 Vt. 220 ; Requa v. Rochester, 45 N. Y. 129 ; Batty v. Duxbury, 24 Vt. 155 ; Hull v. Richmond, 2 W. & M. 337. Under a statute, imposing such liability without this condition, a *turnpike* corporation was held liable for damage sustained in consequence of a *latent* defect in the road, though they used due diligence to discover defects, and keep the road in repair. Yale v. Hampden, &c., 18 Pick. 357.

Recent cases in New Hampshire well illustrate the point under consideration.

Where the cause of the accident and injury is such — whether the act of Providence, or the negligent or malicious act of man, or a combination of these causes — that the town could not have had notice

of it, or, if notified, could not have removed or remedied the cause, or have prevented the accident, the town is not liable. Chamberlain v. Enfield, 43 N. H. 356 ; Palmer v. Portsmouth, Ib. 265.

A jury were instructed, that “ a town was bound at all times to have their highways in a reasonably safe condition for the customary travel, and that it would furnish no answer to the claim of the traveller for damages, who should suffer an injury resulting from a defect in the highway, without fault on his part, that the defect was produced by the elements, and the town had no notice of it, or opportunity to repair it.” Held, the latter branch of the instruction was erroneous, and the jury should have been instructed, that, if the injury resulted from a defect occasioned by the recent sudden action of natural causes, the town was not liable,

obstruction exists by inevitable accident, without fault or neglect on the part of any person, it is not within the statute, unless the town had notice of it, express or implied, and reasonable opportunity, by proper care and vigilance, to have removed it before the accident occurred.¹ But the liability does not depend upon the fact, whether the officers or agents had actual notice of the defect, provided it were of such a character and of such continuance at the time of the accident, that the town was reasonably bound, under all the circumstances, to have remedied it.² Thus notice may be *inferred*, from the notoriety of the defect, and its continuance for such a length of time, as to lead to the presumption that the proper officers of the town knew, or with proper vigilance and care might have known of it.³ A former failure of a culvert may be evidence of defective construction, and of the knowledge of the fact by the town authorities.⁴ So if an injury is caused by the elevation of one edge of a plank, which is laid over an open space left for the passage of water, and this is found to be an actionable defect; it is

¹ Johnson v. Haverhill, 35 N. H. 74.

² Howe v. Plainfield, 41 N. H. 135.
And see Weisenberg v. Appleton, 26 Wis. 56; Chicago v. Johnson, 53 Ill. 91.

³ Holt v. Penobscot, 56 Me. 15; Tinker v. Russell, 14 Pick. 279.

⁴ Willey v. Portsmouth, 35 N. H. 303.

unless, under the circumstances of the case, they ought to have repaired the defect before the accident happened, and had reasonable opportunity so to do; and if they could have had no notice of it, either express or implied, or reasonable opportunity to repair it, the defect was not an obstruction, insufficiency, or want of repairs, within the meaning of those terms as used in the statute, giving to travellers a remedy against the town. Hubbard v. Concord, 35 N. H. 52.

A stick of wood accidentally fell from a load without the fault or neglect of the driver. The plaintiff shortly afterwards passed in his wagon, one wheel of which ran upon one end of the stick, in such manner as to throw up the other end against the wagon, by means of which the plaintiff was thrown out and injured. The jury were instructed, in substance, that if the stick, considering its character and dimensions, should be found by them to be such an obstacle to the customary travel, as that the highway, with that upon it, was not reasonably safe; yet, if it came upon the highway by inevitable accident, without the fault or neglect of any person, and the town or its authorities could have had no notice of it, nor any opportunity to have known of it by reasonable care and diligence on their

part, before the accident, the town were not liable: Held, sufficiently favorable to the plaintiff. Johnson v. Haverhill, 35 N. H. 74.

In Massachusetts, the court remark, in a recent case, "The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper care and vigilance might have known of it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety." Donaldson v. Boston, S. J. C. Suffolk, Oct. 1859, Law Rep., April, 1863, p. 348; Reed v. Northfield, 13 Pick. 98.

The fact that the plaintiff is himself an inhabitant, and had notice of the defect, is immaterial, except as affecting the question of reasonable care on his part. 13 Pick. 98.

It is sufficient that the defect was known to any city officer, whether connected with the street department or not; or generally known; or apparent to ordinary observers. Dewey v. Detroit, 15 Mich. 307.

enough to authorize a verdict for the plaintiff, if the plank has been split, loose, liable to change, and unsafe, for twenty-four hours (the statutory period) before the accident, or if the city authorities had reasonable notice of its unsafe condition, although the position of the plank which was the immediate cause of the accident had continued but for a short time.¹ So the occurrence of a rain and thaw is sufficient notice of a defect in a temporary way over a frozen ditch.² So express notice to two of the inhabitants, capable of communicating the information, though not among the principal men of the town, and not assessed for public taxes, is sufficient notice to a town.³ And the question of notice is held to be for the jury.⁴

§ 11. Upon the principle *in pari delicto*, already explained (chap. 4), when an injury is the consequence of negligence on both sides, no action can be maintained.⁵ (a) One injured by an obstruction in the highway cannot maintain an action, if he did not himself use ordinary care;⁶ which is a question for the jury.⁷ Or such care as persons of common prudence generally exercise.⁸ In other words, it must be proved, that the highway was not safe and convenient; that the plaintiff exercised ordinary prudence and care; and that the injury was occasioned by the defect in the highway alone.⁹ When the injury is occasioned by a defect in the highway, and want of care on the plaintiff's part, jointly, the town is not accountable.¹⁰ Thus it is held that, if the plaintiff had previous notice of the defect, no action lies.¹¹ A plaintiff testified, that he knew of the defect some weeks before the injury, and had driven his horse over it, checking him to a walk because he did not think it safe to pass at a faster gait; that, when he sustained the injury, he was driving a quick, high-spirited horse, accustomed to start quickly as any high-spirited horse is; that he approached the defect on descending ground, going at a trot; that the defect was plainly visible for some distance before reaching it; and that as he ap-

¹ Winn v. Lowell, 1 Allen, 177.

² Savage v. Bangor, 40 Me. 176.

³ Mason v. Ellsworth, 32 Me. 271.

⁴ Coney v. Westbrook, 57 Me. 181.

⁵ Coombs v. Purrington, 42 Me. 332.

See Blood v. Tyngsborough, 103 Mass. 509.

⁶ Smith v. Smith, 2 Pick. 621; 26 Me. 234; Farnum v. Concord, 2 N. H. 392;

Wilson v. Susquehannah, &c., 21 Barb. 68.

⁷ Southworth v. Old, 105 Mass. 342.

⁸ Farrar v. Greene, 32 Me. 574.

⁹ Moore v. Abbot, 32 Me. 46. See Dreher v. Fitchburg, 20 Wis. 675.

¹⁰ Farrar v. Greene, Ib. 574.

¹¹ Nicks v. Marshall, 24 Wis. 139; Durkin v. Troy, 61 Barb. 437.

(a) So in an action for an injury received by a wife while riding with her husband, in case of any want of ordinary care on his part. Carlisle v. Sheldon, 38 Vt. 440.

As to the proof of negligence on the part of the defendants, see Wilson v. Susquehannah, &c., 21 Barb. 68.

proached he did not think of it, but his thoughts were engaged with his professional business. Held, this evidence would not warrant a jury in finding that the plaintiff was in the exercise of due care.¹ So if the injury was occasioned jointly by a defect in the highway, and a defect in the plaintiff's horse, carriage, or harness, rendering the same unsafe or unsuitable, the plaintiff cannot recover, although he had no knowledge of such deficiency, and was in no fault for the want of such knowledge.² Nor if a companion of the driver imprudently seize the reins and turn the horse from the road.³ Nor where the driver loses control over the horse by his throwing his tail over a rein.⁴ Nor in case of driving very much faster than the law allows.⁵ And the burden of proof is upon the plaintiff. The defendants are not bound to prove that the injury was caused by his carelessness.⁶ Thus, in an action for an injury sustained by the overturning of the plaintiff's carriage, the burden of proof is on the plaintiff, to show that he was at the time driving with ordinary skill and diligence.⁷ (a) So, if the neglect to repair is averred to be *on the sides*, and without the travelled path, and the declaration further alleges, that the plaintiff was injured in turning out to go by a team with a cart-load of wood; he must show that he exercised due care in turning out and passing by, and that the damage arose from the want of proper attention by the town to the sides of the road, and not from himself or some independent accident.⁸ So it is not a correct instruction to the jury, that the action can be maintained, though the plaintiff knew of the

¹ *Gilman v. Deerfield*, 15 Gray, 577.

² 32 Me. 574; *Coombs v. Topsham*, 38 Me. 204.

³ *Brooks v. Petersham*, 82 Mass. 181.

⁴ *Fogg v. Nahant*, 106 Mass. 278.

⁵ *Moody v. Osgood*, 60 Barb. 644.

⁶ *Merrill v. Hampden*, 26 Me. 234.

⁷ *Adams v. Carlisle*, 21 Pick. 146.

⁸ *Hull v. Richmond*, 2 W. & M. 337.

(a) In an action against a *bridge corporation*, for an injury sustained in consequence of the lamps not being lighted as required by law; the burden of proof is on the defendants. *Worster v. Canal, &c.*, 16 Pick. 541. See *King v. Police, &c.*, 12 La. Ann. 858.

Provision is sometimes made by statute, for a town's recovering from the party creating an obstruction in the highway the damages which the town itself has been compelled to pay. In such action, the town is entitled to recover, although defects and want of repairs in the highway may have contributed to the accident which resulted in the injury. *Littleton v. Richardson*, 32 N. H. 59.

The true question for the jury is,

whether the incumbrance was the direct and proximate cause of the accident,—that without whose existence it would not have happened. If so, the town may recover, although their negligence may have contributed more remotely to its occurrence, and even although it might have been prevented by a due performance of duty, and the exercise of proper vigilance on their part. *Ibid.*

(In New Hampshire, money expended in defending the former suit, cannot be recovered. Nor the expenses of removing the incumbrance. By the terms of the statute, the remedy is limited to the damages and costs paid the person suffering injury. *Ibid.*)

defect, if it were not of a character from which an injury must so manifestly result in his attempt to pass, as to render it unreasonable for him to make the attempt. The proper instruction is, that, if the defect were such, that men of ordinary care and prudence, having knowledge of the defect, would not, under ordinary circumstances, have attempted to pass at their own risk, the plaintiff had no right to try the experiment at the risk of the town.¹ So where the plaintiff's eyesight was poor and weak, the omission to instruct the jury, upon request, that common prudence requires of a person of poor sight extraordinary care, in walking upon the public streets, and in avoiding obstructions, is ground for a new trial.² (a) So two women attempted to drive over a causeway, laid across a cove, and leading to a ferry in the Connecticut River. There was a freshet in the river, and the water was rising rapidly, and already covered the causeway. The water was also very turbid, and there was a strong current through the cove. The causeway was twenty-five rods long and nineteen feet wide, and there was a bridge about nine rods from the entrance, raised above the level of the causeway, and then standing above the water. The women lived in the neighborhood and were acquainted with the road. Before driving on the causeway, they inquired of a woman who lived close by, whether she should dare to cross; to which she replied that she should not, unless she had a very gentle horse. The women drove in and reached the bridge, the water rising to the hubs of the forewheels. Here they stopped for a while, and could easily have obtained assistance to enable them to turn back. Beyond the bridge there was nothing visible to indicate the line of the road. They passed on, soon became alarmed and bewildered, and drove off the causeway, and one of the women was drowned. In a suit brought by her administrator against the town, to recover damages for the injury, on the ground that it was caused by the negligence of the town in not keeping up a railing along the causeway, and in which the jury rendered a verdict for the plaintiff; a new trial was granted as for a verdict against evidence, on the ground that the

¹ Hubbard v. Concord, 35 N. H. 52.

² Winn v. Lowell, 1 Allen, 177.

(a) Where a blind man, on a strange road, on a night so dark that he could not be seen, hearing a team coming, left the travelled road for self-preservation, and suffered injury through a defect in the road; held, if in doing so he acted with reasonable care and prudence, he

did not contribute to his own injury. Glidden v. Reading, 38 Vt. 52.

If the persons with him were not in his service or employment, nor owed any duty to, or had any care of him; any want of care or prudence on their part would not prevent his recovering. Ibid.

deceased had been guilty of want of ordinary prudence in attempting to pass over the causeway.¹

§ 11 *a*. But in many cases the rule *in pari delicto* has not been strictly enforced.² Thus driving, in a violent storm, through the streets of a city with which the driver is unacquainted, is not, of itself, negligence, which will prevent him from recovering for injury received through defects in the highway.³ So a request to instruct the jury, that, if the plaintiff was intoxicated, this, of itself, would preclude him from the right to recover, was properly refused; the question, what constitutes ordinary care, being for the jury.⁴ So the degree of prudence required of a stranger, knowing nothing of an excavation, when passing along a street in a populous city after nightfall, without any thing to admonish him of danger, must be left to the jury.⁵ (*a*) And, in general, the question of negligence, on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case.⁶ The fact that he had previous knowledge of the defect is not conclusive evidence of negligence. It is a question for the jury. A *general* acquaintance with the defect does not defeat the action. Nor has the fact, that he was an inhabitant of the town and knew of the defect, but omitted to give notice of it to the town, any bearing on the question of the town's liability.⁷

§ 12. According to the principle heretofore laid down (chap. 4), a town has been held liable for an injury occasioned by a defect in a highway, and which would not have otherwise occurred, though the *primary* cause is a pure accident, as, for example, the failure of some part of a carriage or harness; provided the accident occur without the fault or negligence of the party injured, and be one which common prudence and sagacity could not have

¹ Fox v. Glastenbury, 29 Conn. 204.

² Weisenberg v. Appleton, 26 Wis. 56; Ryerson v. Abington, 102 Mass. 526; Pollard v. Woburn, 104 Mass. 84; Fletcher v. Barnet, 43 Vt. 192.

³ Milwaukee v. Davis, 6 Wis. 377.

⁴ Stuart v. Machias, 48 Me. 477.

⁵ Matheny v. Wolffs, 2 Duv. 137.

⁶ Bigelow v. Rutland, 4 Cush. 247;

Mosey v. Troy, 61 Barb. 580; Mahoney v. Metropolitan, 104 Mass. 73. See Cummins v. Spruance, 4 Harr. 315.

⁷ Thomas v. Western, 100 Mass. 156; Whittaker v. West, 97 Mass. 273; Smith v. St. Joseph, 45 Mis. 449; Am. Law Reg., Feb. 1873, p. 122; Tinker v. Russell, 14 Pick. 279.

(*a*) In an action for injuries sustained by collision with a wagon left by the defendant in the highway, it appeared that the accident happened in a dark evening, while the plaintiff was driving slowly and looking out on one side for a blanket which he had dropped, while his companion was looking out upon the other, for

which reason neither of them saw the defendant's wagon until the collision took place. The plaintiff had seen the wagon in the same place upon the same day. Held, it did not appear, as matter of law, that the plaintiff had failed to show due care, and that the question should be submitted to the jury. Fox v. Sackett, 10 Allen, 535.

foreseen and guarded against.¹ (a) A traveller is bound only for ordinary care and prudence, in providing a suitable horse, carriage, and harness. Also to exercise ordinary care, skill, and prudence in the management of his team; such as mankind in general, and not persons of the same class or division of mankind as himself, are accustomed to use.² So a town is liable, though the accident was caused in part by the fright of an ordinarily gentle and well-broken horse.³ So evidence that the plaintiff was riding a gentle horse, bareback, and without martingales, over a familiar road, in a dark night, that he was in the habit of managing horses and of riding this one, and that he turned out on meeting a carriage, does not, as matter of law, show want of due care.⁴ Nor is a person necessarily chargeable with want of ordinary care, by driving with ordinary skill upon a defective highway a vicious horse, of whose viciousness he has no knowledge.⁵ So the town may be responsible, though the plaintiff's horse, without the fault of the town, should be running violently at the time, and though the injury might not have occurred but for such violent running. And to account for the violence of his horse, the plaintiff may show that, near the defect where the damage occurred, there was another defect which he had just passed, though without injury.⁶ But if the vices of the horse or the defects in the carriage contributed to the injury, the plaintiff must not only show that he did not know, and had no reason to suppose, that such vices or defects existed, but that he was in no fault in not knowing it.⁷ And a town is held not responsible, if a horse, being frightened by an accident, breaks away from his driver, and escapes from all control, and afterwards, while running at large, meets with an injury through a defect in a highway.⁸ So a horse, drawing a sleigh, and carefully driven, be-

¹ *Palmer v. Andover*, 2 Cush. 600.
See *Hyde v. Jamaica*, 1 Williams, 443.

² *Clark v. Barrington*, 41 N. H. 44;
Tucker v. Henniker, Ib. 317; *Fletcher v. Barnet*, 11 Am. Law Reg. 197.

³ *Stone v. Hubbardston*, 100 Mass. 49.

⁴ *Stevens v. Boxford*, 10 Allen, 25.

⁵ *Daniels v. Saybrook*, 34 Conn. 377.

⁶ *Verrill v. Minot*, 31 Me. 299.

⁷ *Winship v. Enfield*, 42 N. H. 197.

⁸ *Davis v. Dudley*, 4 Allen, 557. See *Manderschild v. Dubuque*, 25 Iowa, 108.

(a) The court explained to the jury in what a want of care would consist, and what it was the duty of the plaintiffs to do, in order to negative a want of care, and added, "You will then inquire whether such want of care and prudence contributed to the accident. If you find that it did not, that the accident would have happened the same if such want had not existed, then such a want of care is of no consequence in the case,

and will not prevent a recovery." Held, the charge was not erroneous. *Walker v. Westfield*, 39 Vt. 246.

The test is, not whether the accident would have occurred independently of such want of care and prudence, but whether such want contributed to the accident. *Ibid.*

The question may be put to the jury, whether such want of care contributed to the injury. *Ibid.*

came frightened and excited by the striking of the sleigh against a post in the highway, broke from the driver, turned, and, at the distance of fifty rods from the place of collision, knocked down the plaintiff, who was passing on foot, and using reasonable care. In an action against the city, held, though the post was a defect in the highway, the city was not responsible, the defect not being the immediate cause of the injury.¹ And, in general, a town or city is not liable, for an injury caused by the combined effect of the unsafe condition of a highway, and the unlawful or careless act of a third person.² Nor unless the accident is occasioned by causes which occurred entirely within the highway.³

§ 13. A declaration for such injury, that at the time "the plaintiff was walking along and across the highway, in the due prosecution of his business and in a proper manner," is a sufficient allegation, after verdict, that the plaintiff was at the time in the exercise of ordinary care.⁴ Nor is it necessary, in order to enable the plaintiff to give evidence of ordinary care, that his declaration should aver that fact; if it avers that the injury was caused by the defect in the highway.⁵

§ 14. The questions, whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road, and entirely without fault on the part of the plaintiff; are held to be questions of fact, ordinarily mixed, however, with questions of law, requiring comment by the court. (a) But, how far towns are bound to clear away obstructions, natural or artificial, from that portion of the highway exterior to the wrought way; and how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring field from a real or supposed necessity, or for such as may arise in attempting

¹ *Marble v. Worcester*, 4 Gray, 395.

² *Shepherd v. Chelsea*, 4 Allen, 113.

³ *Rowell v. Lowell*, 7 Gray, 100.

⁴ *Raymond v. Lowell*, 6 Cush. 524.

⁵ *May v. Princeton*, 11 Met. 442.

(a) There is no error in refusing an instruction, that "slight negligence" on the part of the plaintiff, which contributed directly to the injury, would prevent a recovery. "Slight negligence" is not equivalent to "slight want of ordinary care." *Dreher v. Fitchburg*, 22 Wis. 675.

Nor is it error to refuse to instruct, that, if any other cause than the defend-

ant's negligence contributed to the injury, the defendant would not be liable. *Ibid.*

Nor that the plaintiff might recover, notwithstanding such other cause contributed to the injury, unless such other cause was attributable to some want of care on his part, if the accident could not have occurred except for the defect in the highway. *Ibid.*

to pass a bridge obviously unsafe or dangerous, or in fording a stream in such case; are mainly questions of law, calling for special instructions from the court. Thus the plaintiff was travelling upon the highway in the village of Montpelier. The travelled path was from twenty to thirty feet wide; in the ditch, and three feet from the outer edge of the travelled path, and about five or six feet from the fence, a hole had been dug, about three feet square and two feet deep, of which the highway surveyor had notice. There was nothing between the hole and the fence but an elevated sidewalk. There was some snow upon the sides of the road, but none in the travelled path. Sleighs had been driven in the ditch, and had made a path there upon the snow at the place where the hole was dug. The plaintiff was passing along the highway, in a dark night, with a horse and sleigh, and ran into the hole, whereby his horse and sleigh were injured. Held, the jury should have been instructed, that, if the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or if the horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness; the town should not be responsible.¹ (a)

§ 15. If a traveller, in the exercise of ordinary care and prudence, voluntarily leaps from his carriage, because of its near approach to a dangerous defect in the highway, and thereby sustains an injury, the town is liable, although the carriage do not come in actual contact with the defect. But these facts do not support a declaration, that the party was "violently thrown from a wagon upon the ground by reason of a defect in the highway;" though the objection ought ordinarily to be taken before the case is submitted to the jury. And if such case is tried and submitted to the jury, entirely upon the hypothesis that the plaintiff was so thrown to the ground; and afterwards, to an inquiry by the jury, the judge answers, that the action can be maintained, if the plaintiff voluntarily jumped to the ground through imminent peril: a verdict against the defendants will be set aside.²

§ 16. A traveller, to recover for loss caused by a deficiency in a road, is not obliged to look far ahead, in order to guard against

¹ Rice v. Montpelier, 19 Vt. 470.

² Lund v. Tyngsboro, 11 Cush. 563.
See Morse v. Richmond, 41 Vt. 435.

(a) The rule of the road, of *passing to the right*, only applies to and regulates the conduct of travellers *as between themselves*.

Its violation cannot show want of care in regard to defects in the road. Grier v. Sampson, 27 Penn. 183.

obstructions, which ought not to be suffered to exist. Thus where a person, travelling with a horse and wagon, might from an eminence in the road have seen, that a causeway, at a considerable distance, which he intended to pass over, was covered with water; but, when he descended the hill, the causeway was out of sight, until he had proceeded too far either to turn back or go on with safety; and he then used ordinary care in endeavoring to extricate his horse from the danger, but without success: he may recover for the loss.¹

§ 17. Where one, who had occasion to cross, in the day-time, from one side of a street to the other, selected for that purpose a portion of the street, which, having been necessarily and properly appropriated for a drain, was covered by an iron grating, and, in attempting to cross over the grating, fell and was injured, there being no reason for attempting to cross at that place rather than any other part of the street; held, not ordinary care, and he cannot recover damages.² Nor one who goes out of the highway, because of the defect therein, into the adjoining land, and there receives an injury.³ But, though there were other streets by which the party might have reached the point he was aiming at, the city is liable, if it did not give notice and warning, by closing up the street out of repair, or in some other way.⁴

§ 17 *a*. A resident of a city may recover of the city for an injury caused by a defective way, notwithstanding a city ordinance against driving at a "faster rate than six miles an hour," which he was violating, unless such violation contributed to the injury; and a general verdict for the plaintiff is not necessarily erroneous, because the jury did not agree upon the answer to the question, whether he was driving at that rate.⁵

§ 17 *b*. One cannot maintain an action for injury caused by a defect in the road, where he was on his way to a friend's house on a sabbath evening.⁶ But it is no defence to an action for injury caused by a defective highway, that the plaintiff was travelling on Sunday, if the journey was for the purpose of seeing his children, who were properly away from home; this being a "work of necessity."⁷ And under a statute which provides, that "whoever travels on the Lord's day, except from necessity or charity," shall be pun-

¹ *Thompson v. Bridgewater*, 7 Pick. 188.

² *Raymond v. Lowell*, 6 Cush. 524.

³ *See Champaign v. Patterson*, 50 Ill. 61.

⁴ *Tisdale v. Norton*, 8 Met. 388.

⁵ *Erie, &c. v. Schwingle*, 22 Penn. 384.

⁶ *Baker v. Portland*, Am. Law Reg., N. S. vol. 10, No. 19; Sept. 1871, p. 559.

⁷ *Cratty v. Bangor*, 57 Me. 423.

⁸ *M'Clary v. Lowell*, 44 Vt. 116.

ished by fine; a person walking a short distance in the streets for exercise or recreation is not a *traveller*, and may maintain an action for injuries sustained from a defect in the highway.¹

§ 17 *c.* A six-years-old child wandered six blocks from home, and, in climbing upon a heavy counter, which some person unauthorized by the city had leaned against a fence by the sidewalk fourteen feet wide of a crowded thoroughfare, was killed by its fall. In an action against the city, held, it is not the duty of a city to make its streets a safe play-ground for children; that the negligence of the parents in the premises was greater than that of the city, and the verdict for the plaintiff unjustifiable. In such a case, the degree of carelessness is not to be judged by a single fatal accident, but by all the circumstances, — the character of the obstruction, the width of the sidewalk, the proper uses of the thoroughfare, &c.²

§ 17 *d.* The streets and sidewalks are for the benefit of all conditions of people, and all have the right to assume that they are in good condition, and to regulate their conduct upon that assumption, even in the darkness of night, and this, too, in the case even of those of imperfect sight. Where the plaintiff was partially blind, the question, "Was it so improper for her to have gone into the street unattended, in her then condition of sight, that it would be negligence on her part to do so, sufficient to prevent her receiving compensation for an injury she might sustain from the negligence of others, while passing along the street?" was proper to be submitted to the jury on the question of her contributory negligence. Whether the plaintiff had sight enough to walk through the streets, with "a reasonable assurance of safety," was a fair test of capacity to be submitted to the jury.³

§ 18. With regard to the nature and proof of the *injury*, necessary to maintain an action, it is held, in New Hampshire, that the statute limits the remedy to such injuries as are received by a person, his team, or carriage, directly from the defect, in using or attempting to use the highway as such.⁴ So, in Connecticut, under a statute making towns liable to pay "just damages" for defects in roads and bridges, a town is not liable for the loss of service, and expense of the nursing, of a wife and daughter, injured by

¹ *Hamilton v. Boston*, 14 Allen, 475.

² *Chicago v. Starr*, 42 Ill. 174.

³ *Davenport v. Ruckman*, 37 N. Y. 387.

⁴ *Ball v. Winchester*, 32 N. H. 435.

See *Woodman v. Nottingham*, 49 N. H.

such defect.¹ So, by "damage in one's property," within the meaning of the statute of Maine, is intended some injury to an article, by which its value is destroyed or diminished; not a mere loss of time, or an addition to expenses.² But bodily pain is among the items for which compensation is to be made.³ And in an action for "bodily injury," the jury may also allow for loss of time resulting from the injury, and for expenses suitably incurred to obtain a cure.⁴ (a) Only one action can be maintained. In case of permanent injury, therefore, prospective damages may be recovered.⁵

§ 19. The question of a town's liability is sometimes affected by the actual or supposed responsibility of other parties for the same injury. (b) In general, municipal corporations cannot avoid their

¹ Chidsey v. Canton, 17 Conn. 475.

² Weeks v. Shirley, 33 Me. 271; Ver-
rill v. Minot, 31 Ib. 299.

³ Mason v. Ellsworth, 32 Ib. 271.

⁴ Sanford v. Augusta, 32 Me. 536.

⁵ Weisenberg v. Appleton, 26 Wis. 56.

(a) As proof of the injury, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible for the plaintiff. *Bacon v. Charlton*, 7 Cush. 581.

(b) See *Mechanicsburg v. Meredith*, 54 Ill. 84; *M'Intire v. Randolph*, 50 N. H. 94; *Swanzy v. Chace*, 82 Mass. 363; *Stackhouse v. Lafayette*, 26 Ind. 17; *West v. Mason*, 102 Mass. 341; *Pfau v. Reynolds*, 53 Ill. 212.

There may be a concurrent remedy against the town and the party causing the obstruction. *Durant v. Palmer*, 5 Dutch. 544.

A party placing obstructions in a highway is answerable to the town, and bound by a judgment recovered by a traveller against the town for such cause, if he has due notice of the suit. In an action against him, unless it appears on the face of the record that the recovery must have been for the same cause, that fact must be proved, to make the judgment evidence of any thing but the fact of its recovery. Where the declaration against the town alleged the damage to have resulted from the obstruction now complained of, and from want of proper repair and of a suitable railing, it must be shown that the recovery was on account of the obstruction. And evidence is admissible that the recovery was on account of the defects of the road and its railing. *Littleton v. Richardson*, 34 N. H. 179. See *Severin v. Eddy*, 52 Ill. 189.

Ordinarily, where incumbrances or ob-

structions have been placed in a highway by individuals, the town will be liable in the first instance to the injured party, and may have a remedy over upon the party causing the obstruction. *Winship v. Enfield*, 42 N. H. 197. *Lowell v. Boston, &c.*, 23 Pick. 24.

An exception is made, where a railroad has necessarily created a danger which the town cannot obviate. *Willey v. Portsmouth*, 35 N. H. 303.

The defendant leased the lower story of a building for shops, and portions of the upper story, miscellaneous, including one or two rooms, to the town, the plaintiffs, himself remaining in possession of the residue. An awning erected along the whole front for the benefit of the shops fell, from a defect therein, and injured a passenger, who recovered damages of the plaintiffs for such injury. Held, the plaintiffs might recover the damages without joining the occupants of the shops in the action; and that, after notice of the previous action, a request to defend it, and a statement that, if they were liable, he was liable to them, because the injury, if any, must have occurred from his negligence, the former judgment was conclusive, in the present action, of a defect in the highway, the injury to the former plaintiff while exercising due care, and the amount of injury. *Milford v. Holbrook*, 9 Allen, 17; acc. *Chicago v. Robbins*, 2 Black, 418. (Though it would be otherwise if both were in fault.)

The same principle has been applied to the action of a town against a rail-

responsibility as to highways by an arrangement with another party.¹ Thus it is held that such liability is not varied or discharged, though the defect is occasioned by the exercise of the right of an adjoining owner of land to use the street or way for some private purpose, not inconsistent with the right of the public.² So the town are primarily liable, although the defect is caused by a railroad corporation, in constructing their road according to their charter,³ and though the railroad is required by its charter so to construct its works as not to obstruct the safe and convenient use of any highway.⁴ And municipal authorities have no power to modify or repeal a law, declaring certain streets to be public highways, by consenting to the construction of a railroad thereon. The rights of the public will be protected against the

¹ *Blake v. St. Louis*, 40 Mis. 569.

² *Bacon v. Boston*, 3 Cush. 174.

³ *Phillips v. Veazie*, 40 Me. 96. Nor-

ristown v. Moyer, 11 Am. Law Reg. 199.

⁴ *Elliot v. Concord*, 7 Fost. 204.

road to recover the amount recovered in a previous suit against the town. *Hamden v. New Haven, &c.*, 27 Conn. 168.

In case of notice of the suit, the railroad are held *estopped* and liable for the costs. *Veazie v. Penobscot, &c.*, 49 Me. 119. See *Eaton v. European*, 50 Me. 520.

A city may recover from a street railway the amount of damages recovered from the former for an injury caused by failure of the latter to keep in repair the part of a street between the rails, according to a contract between the parties. *Brooklyn v. Brooklyn*, 47 N. Y. 475.

Where by statute several towns and a railroad are jointly required to keep a bridge in repair, and the municipal officers of one of the towns are to have the care and superintendence of it; such officers are agents of all the parties, and the railroad cannot maintain an action against such town for damages caused by a defect in the bridge. *Malden, &c. v. Charlestown*, 8 Allen, 245.

One guilty of a nuisance, in making an excavation in a public highway, will be responsible for injuries arising therefrom during its continuance. *Portland v. Richardson*, 54 Me. 46.

A person is liable for maintaining an obstruction, in a highway, whereby a traveller receives injury, although he did not himself place it there. *Stoughton v. Porter*, 13 Allen, 191.

In an action for injuries sustained by falling into an area or hole which the defendants had excavated on their premises, fronting on a public street, it appeared

that the plaintiff, while walking along the sidewalk on a dark night, came upon a pile of stones and earth which the defendants had thrown out on the sidewalk, and which lay immediately in front of the hole. The plaintiff, in his effort to pass the obstruction, took an inward course toward the defendant's premises, and, though using due care and caution, was precipitated into the hole. Held, the plaintiff could recover, though he went upon the defendant's land to avoid the obstacle. *Vale v. Bliss*, 50 Barb. 358.

It is held that a joint action does not lie against a city and an individual for injury caused by an excavation made by the latter. *Trowbridge v. Forepaugh*, 14 Minn. 133.

But the owner of a house, who suffered the cellar-way leading to it to become and remain in a dangerous condition, is liable to the plaintiff for damages suffered through such negligence, and may be joined with the corporation in one suit. *Davenport v. Ruckman*, 37 N. Y. 568.

It is no defence to an action against a town, that the town contracted with A that he should make all trenches needed for laying water-pipes in such streets as the water-committee might direct, and guard and light the trenches by night for the safety of travellers. Nor that the defect had not existed twenty-four hours, and the town had no notice of it. *Brooks v. Somerville*, 106 Mass. 271.

municipal as well as the railroad corporation.¹ Thus by Stat. 1830, c. 4, establishing the Boston and Lowell Railroad Corporation, it was provided (§ 11), that, if the railroad should cross any highway, it should be so constructed, as not to impede the safe and convenient use of such highway. Where an excavation was made by such corporation in a highway, for the purpose of constructing the railroad across it, and an injury sustained by a person travelling on the highway, in the evening, in consequence of being thrown into the excavation; it was held that the town was liable to an action, although the town had given notice to the superintendent of the work on the railroad, that a barrier must be put up for the protection of travellers on the highway, and such superintendent had promised that this should be done.² So when railroads obstruct the highways, towns must provide a suitable and proper by-way around the obstruction, and use proper and reasonable precaution to divert the travel. Such by-way is an open public way for the time being, and the town must make it reasonably safe for the public travel, or see that it is made so by others. And, though the railroad be bound to make the by-ways, and fail to make them safe, this will not exonerate the town.³ So a statutory provision, that it shall be the duty of commissioners of highways, to cause all roads located by them to be constructed and finished to their *acceptance*, was held not to vary the responsibility of towns for injuries occasioned by defects in highways, nor in any event to give an action against the county. The acceptance by the commissioners, contemplated by the statute, is not the acceptance of the highway, or the act which opens it as a highway for public use, but of the construction of the road.⁴ But a town is not liable for injuries happening upon a *ford-way*, lying out of the limits of the highway, and used by reason of the neglect to repair a bridge, although with the consent of the landowner; if not opened according to statute, or dedicated to and accepted by the town. The town's neglect to repair the bridge must be the immediate cause of an injury, in order to render it liable therefor.⁵

§ 20. And the general rule is laid down, that, if the injury were caused by the negligent acts of a third person in the highway, that will not make the town liable, unless the highway were defective,

¹ Commonwealth v. Erie, &c., 27 Penn. 339.

² Currier v. Lowell, 16 Pick. 170.

³ Batty v. Duxbury, 24 Vt. 155.

⁴ Bliss v. Deerfield, 13 Pick. 102.

⁵ Hyde v. Jamaica, 1 Will. 443.

or in some way obstructed or encumbered.¹ So a town is not liable for an injury occasioned to a traveller passing from a public highway to a railroad station, through a road opened by the proprietors of the railroad for that purpose, by a block of stone lying within the limits of the highway, as located, and obstructing the entrance of the road to the station, if it does not obstruct the road-bed of the highway.² So, if the proprietors of a railroad, acting within their authority, construct a cattle-guard in their road, at a place where it crosses a highway on the same level; and the town erect and maintain a sufficient and proper barrier against such cattle-guard up to the railroad, and as far as can be done without impeding the passing of cars thereon: the town are not responsible for an injury sustained by a traveller on the highway, in consequence of his falling into the cattle-guard.³ So a town is held not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair.⁴ So the licensing of an individual to occupy a part of a public street exclusively for his own benefit, by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to a city council. No action lies against the city by a person suffering special damage by reason of such railroad, although the party licensed may have given bond to indemnify the city against such damages.⁵

§ 21. With regard to the technical character of, and the pleadings in, the action now under consideration, the action is not an action *respecting an easement on real estate* within the meaning of a statute which uses these terms, and therefore cannot be commenced in Massachusetts in the Supreme Court.⁶

§ 22. Great liberality has been allowed in the form of declaring in this class of actions; more especially after a verdict for the plaintiff. Thus the particulars of defect need not be alleged; but only that the injury was caused by the defect, insufficiency, and want of repairs of the highway. Nor is it necessary that the injuries should be particularly described. It is enough if the declaration shows a bodily injury, if this is the ground of action. Thus, if the declaration allege, that the plaintiff and his child "were thrown from his wagon with great force and violence, and he and the child

¹ Chamberlain v. Enfield, 43 N. H. 356.

² Smith v. Wendell, 7 Cush. 498.

³ Jones v. Waltham, 4 Cush. 299.

⁴ Sawyer v. Northfield, 7 Cush. 490.

See Coffin v. Rich, 45 Me. 507.

⁵ Green v. Portland, 32 Me. 431.

⁶ Hunt v. Hanover, 8 Met. 343.

greatly injured and damaged thereby," it will be good after verdict. Nor is it necessary, if the declaration alleges that the injury was caused by defect of the highway, to aver that the plaintiff was himself in the exercise of ordinary care. Nor, where the highway described is alleged to be in the defendant town, to aver, in addition, that the part of it where the accident happened was in that town. And, if the declaration allege, that the road was a highway which the town was bound to maintain, on the 8th of July, and at the time when the suit was brought, and that the accident happened "on the said 8th day of July;" it is a sufficient allegation, after verdict, that the town was bound to maintain the highway when the accident happened.¹ (a)

§ 23. A declaration averred, that the plaintiff, on August 27, 1831, "at Chelmsford, was travelling on a highway in Chelmsford, which highway the town are by law bound to keep in repair, on a part of the highway leading from the dwelling-house of I. S. to the stone guide-post near the Middlesex Turnpike in Chelmsford;"

¹ Corey v. Bath, 35 N. H. 530. See Holt v. Penobscot, 56 Me. 15.

(a) In a statutory action to recover double damages of a bridge corporation, for an injury occasioned by a defect in the bridge, it is not necessary to allege that the plaintiff was entitled to double damages, or conclude *contra formam statuti*. But it must be averred that the corporation had reasonable notice of such defect; and the want of such averment is not cured by a verdict for the plaintiff. *Worster v. Canal*, &c., 16 Pick. 541.

A count at common law, for an injury sustained in consequence of a defect in a bridge, may be joined with a count on the statute, claiming double damages for the same injury; the form of the action being the same in both counts. *Ibid*.

In such action the declaration alleged, that the defendants were by law bound to keep the bridge in repair, but not that they were the proprietors thereof, nor that they had any interest or control over it, nor that the bridge authorized to be erected by the act incorporating the defendants was ever built, nor that the bridge mentioned in the declaration was built by the defendants by virtue of such act, nor what kind of bridge it was, nor whether it was public or private, nor that the plaintiff had any right to pass over the same; neither did it set forth or allude to the act incorporating the defendants and creating their liability to repair the bridge. After verdict, it was held that these were merely defects

in the manner of stating the liability of the defendants, and so were cured by the verdict. *Ibid*.

In the same action, the declaration contained two counts for the same injury, — the first alleging it to have been caused by a defect in the bridge, and also by a neglect on the part of the defendants to light the lamps, and the second count omitting the latter cause. The jury found that both causes were proved, and returned a general verdict for the plaintiff. It was held, that, if the first count was insufficient, judgment might be entered on the second count. *Ibid*.

In the same action the declaration alleged, that the plaintiff sustained the injury in consequence of a defect in the railing of the bridge. It appeared, that, in repairing the bridge, a portion of the footway and railing was removed, in order to allow the travel to pass from the bridge to certain land by the side of the bridge, provided by the corporation temporarily, as the common travelling path; that this land was enclosed by a fence, through an aperture in which the plaintiff passed and fell overboard. It was held that this was not a variance. *Ibid*.

In a late case, an action was maintained for injury sustained by a latent defect in a bridge, which with care might have been discovered. *Rapho v. Moore*, 68 Penn. 404.

that the highway within such limits was defective and in want of repair; that the plaintiff, "being so travelling as aforesaid, at the time and place aforesaid," sustained the injuries complained of in consequence of such defect and want of repair. After a verdict for the plaintiff, it was held that the declaration was sufficient, although it did not state that the town was bound by law to maintain and repair the highway where the accident happened *at the time of such injuries*, and although there was no direct averment that the defective part of the road where the accident happened was within the town of Chelmsford, and although there was no allegation that the defect and want of necessary repair were against the form of the statute.¹

¹ Read v. Chelmsford, 16 Pick. 128.

CHAPTER XXXVIII.

MISCELLANEOUS RIGHTS AND LIABILITIES OF MUNICIPAL AND OTHER
SIMILAR CORPORATIONS.

1. General liability of municipal corporations.

3. Rights and liabilities of corporations acting under express charters.

4. Form of liability, whether under the statute or at common law.

9. Rights and liabilities of individuals acting under express charters.

§ 1. IN other connections (see *Nuisance, Master and Servant*) we have occasion to speak of the general rights and liabilities of municipal corporations. Some miscellaneous rules, chiefly though not wholly applicable to bodies of this class, may more properly be stated as supplementary to several preceding chapters. (*a*)

(*a*) See *Russell v. Burlington*, 30 Iowa, 262. It may be remarked at the outset, that many of the numerous cases upon this subject are quite irreconcilable with each other. A few extracts from the opinions in leading cases will show the nature of the distinctions upon which conflicting decisions purport to rest; but these distinctions may safely be pronounced very nice, and not always very satisfactory.

"There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry . . . may show that it was unlawful. Still, if it was not known . . . to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote . . . or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit . . . reason and justice obviously require that the city . . . should be liable to make good the damage sustained by an individual." Per Shaw, C. J., *Thayer v. Boston*, 19 Pick. 515.

"When a municipal corporation undertakes to execute its own prescribed regulations, by constructing improvements for the especial interest or advantage of

its own inhabitants . . . it is to be treated merely as a legal individual, and, as such, owing all the duties to private persons, and subject to all the liabilities that pertain to private corporations or individual citizens. To this class most clearly belongs the construction, repair, and maintenance of its streets. Nor does this conclusion give the least countenance to the supposition that the corporation is liable for the misconduct of the officers it selects, when performing duties for or between private individuals. In such cases, the whole duty of the corporation is performed when the selection is made, and, having no interest in, or control over, the performance of such services, no liability attaches." Per Ranney, J., *Dayton v. Pease*, 4 Ohio St. 80.

"Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary; such as to the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen. . . . Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual for the failure on

§ 2. The general doctrine is laid down, that an action sounding in tort may be maintained against a municipal corporation; that such corporation may be liable, in an action on the case, for an act which would warrant a like action against an individual; provided that such act is done by the authority of the corporation, or of a branch of its government, authorized to act for the corporation upon the subject to which the particular act relates; or that, after the act has been done, it has been ratified by the corporation by any similar act of its officers.¹ A municipal corporation is liable for injury held to be caused by the insufficient construction of its public works.² Thus an action on the case was held to lie against the corporation of the city of New York, for injuries occasioned by the negligent and unskilful construction of a dam on the Croton River, being a part of the works built pursuant to the act for supplying the city with water (Stat. 1834, p. 451); the title to the land upon which the same was erected being vested in the corporation, pursuant to the fourteenth section of the act.³ So the city of New York was held liable for damages, caused by the breaking down of a vault, built by permission under the street; the injury

¹ *Thayer v. Boston*, 19 Pick. 511; acc. *Tinker v. Russell*, 14 Pick. 279; *Wilde v. New Orleans*, 12 La. Ann. 15; *Winslow v. Perquimans*, 64 N. C. 218. See *Murtaugh v. St. Louis*, 44 Mis. 479; *Seaman v. N. Y.*, 3 Daly, 147; *Haskell v. Penn.*, 5 Lans. 43; *Chicago v. Johnson*, 53 Ill. 91; *Covington v. Bryant*, 7 Bush, 248; *M'Don-*

ough v. Virginia, 6 Nev. 90; *Williams v. Dunkirk*, 3 Lans. 44; *Oliver v. Worcester*, 102 Mass. 489.

² *Rochester, &c. v. City, &c.*, 3 Comst. 463. See *Mayor, &c. v. Furze*, 3 Hill, 612; *Radcliff v. Brooklyn*, 4 Comst. 195.

³ *The Mayor, &c. v. Bailey*, 2 Denio, 483.

their part to perform such a duty. But the duties arising under such grants . . . must not be confounded with the burdens imposed, and the consequent responsibilities arising under another class of powers usually to be found in such charters, when a specific and clearly defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures." Per Clifford, J., *Weightman v. Washington*, 1 Black, 89.

"It would be a very unreasonable and a very mischievous thing, if, in the case of corporations dealing with the public or with individuals, such corporation should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing those acts, and should be driven to seek a remedy against the individual corporators

whose decision, or order in the name of the corporation, may have led to the mischief complained of." Per Lord Westbury, *Mersey v. Gibbs*, L. R. 1 H. L. 93; 11 H. L. Cas. 686.

"Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. . . . The members of the fire department . . . act rather as officers of the city, charged with the performance of a certain public duty." Per Bigelow, C. J., *Hafford v. New Bedford*, 16 Gray, 302.

being occasioned by the negligent and improper act of a contractor, who was building a sewer in the street, under a contract with the corporate authorities, in unduly piling the excavated earth, &c., over such vault.¹ So a municipal corporation, owning lands on a watercourse from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants.² And, in general, municipal corporations are held to be responsible to the same extent, and in the same manner, as natural persons, for the negligence or want of skill of their agents, in the construction of works for the benefit of their municipalities.³ Thus a municipal corporation is responsible to individuals for damages resulting from want of care or skill in their public surveyor, elected by them, by reason of which a bridge on a public highway over a canal was destroyed.⁴ So where a highway is laid out by county commissioners, and the road and a bridge are built by a city, acting through their agents, a party owning land on the stream, over which the bridge is built, may recover damages for a change in the current consequent thereon, without proving wanton negligence on the part of the city or their agents. It is sufficient if want of ordinary care in its construction be shown.⁵ So the trustees of a village, made, by its charter, commissioners of highways, in respect to their functions as such, are to be regarded as the agents of the corporation, in such a form as to make the latter responsible for their acts or omissions, according to the law of master and servant.⁶ So a municipal corporation was held liable for injury to a passenger in an omnibus, which broke through a defective bridge, although built according to the advice of competent engineers.⁷ So a municipal corporation, having ordered certain grading to be done in a street and adjoining avenue, and the work being carelessly and negligently performed, is liable in damages to any one who sustains damage from such negligence and carelessness.⁸

§ 2 *a*. But, on the other hand, the general rule is stated to be, that an action does not lie against a municipal corporation for neg-

¹ *Delmonico v. New York*, 1 Sandf. 222. See *Dorman v. Jacksonville*, 13 Flor. 538; *Lowenthal v. N. Y.*, 5 Lans. 532; *McCarthy v. Syracuse*, 46 N. Y. 194.

² *Stein v. Burden*, 24 Ala. 130.

³ *Ross v. Madison*, 1 Cart. 281; *Danbury v. Norwalk*, 37 Conn. 109.

⁴ *Dayton v. Pease*, 4 Ohio, N. S. 80.

⁵ *Stone v. Augusta*, 46 Me. 127.

⁶ *Conrad v. Trustees, &c.*, 16 N. Y. (2 Smith) 158.

⁷ *Weightman v. Washington*, 1 Black, 39.

⁸ *Lacour v. New York*, 3 Duer, 406.

lect of duty imposed by a general law and not by its charter, unless expressly authorized by statute;¹ and that a municipal corporation, authorized to make ordinances for the good government of its streets and citizens, is not to be responsible for injuries arising from their neglect or violation.² The general propositions are laid down, that nuisances may exist in a city without rendering it liable for the consequences; that a city is no general warrantor against the acts of individuals; and cannot be held responsible for the acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented;³ and that no action can be maintained against a municipal corporation, for error of judgment, where no fraud or malice is imputed.⁴ Thus it is held, that the street commissioner of the city of New York is not, in such sense, an officer or agent of the corporation, as to render it liable to an action for his neglect or refusal to perform a duty enjoined on him by an act of the legislature.⁵ So one injured by the negligence of a fire department cannot maintain an action against the city, although the act establishing such department required an acceptance thereof by the city council.⁶ So it is the duty of the persons, for whose accommodation a road subject to gates is laid, to maintain such gates, and, for a neglect to do so, such person, and not the town, is liable for injuries caused by cattle escaping upon the plaintiff's land from the land adjoining, provided they were rightfully there.⁷ So no action lies against a city, for permitting, in the proper exercise of authority, railroad tracks on the streets, or raising the grade of streets.⁸ So the neglect of the authority establishing a road to prescribe its width excuses a town from liability for not opening and working it.⁹ So owners of unimproved lots, adjoining unmade streets, cannot recover damages from a town, for filling, ditching, or cutting down a street, for they are presumed to purchase with a view to a reasonable improvement. When a grade has not been established, they must exercise reasonable care and judgment in improving, with a view to a reasonable and proper grade; and the town will not be liable

¹ *State v. Burlington*, 36 Vt. 521. See *Detroit v. Blackeby*, 21 Mich. 84; *Farely v. Cincinnati*, 2 Disn. 516; *Kittle v. Fremont*, 1 Neb. 329; *Hafford v. New Bedford*, 82 Mass. 297; *Hughes v. Baltimore*, Taney, 243; *Indianapolis v. Miller*, 27 Ind. 394.

² *Levy v. New York*, 1 Sandf. 465. See *Vincennes v. Richards*, 23 Ind. 381; *Richardson v. Brooklyn*, 34 Barb. 569.

³ *Howe v. New Orleans*, 12 La. Ann. 481.

⁴ *Duke v. Rome*, 20 Geo. 635.

⁵ *Altemus v. New York*, 6 Duer, 446.

⁶ *Fisher v. Boston*, 104 Mass. 87.

⁷ *Proctor v. Andover*, 42 N. H. 362.

⁸ *Murphy v. Chicago*, 29 Ill. 289.

⁹ *State v. Leicester*, 33 Vt. 653.

for injuries to their improvements by grading, if by such care the grade could have been anticipated. Though if buildings are put up on a lot in accordance with an established grade, and afterwards the grade is altered to the injury of the owner, he is entitled to compensation.¹ So a direction to an officer to remove obstructions in a certain alley does not make the city liable for the removal of property outside the limits of the alley, though the officer believed it to be inside of those limits. And it seems, that an express direction from the city council to remove the property in question would not make the city liable; for the common council is but the agent of the city, and has no authority from the city to do unlawful acts.² So an action against a municipal corporation for damages, for an injury caused by a defective covering or insufficient protection of an opening in a sidewalk, made by an owner of the soil or adjacent land, can only be maintained, upon proof of notice to the corporation of such defect, and neglect to cause it to be remedied.³ To charge the city, it is necessary either to prove actual notice, in case of defects not occasioned by their own acts, or such defects must be so notorious as to be evident to all passers.⁴ So a city is not liable for failure to keep in repair a public cesspool, whereby waste water accumulates and flows into the cellar of a neighboring house, which is not connected by a drain with the public sewer.⁵ So a city may connect its sewers and drainage with any natural channel for the flow of water, without incurring liability to keep that channel open to its mouth; though the State or the owners of the lots through which it passes have made an artificial and covered substitute in place of the natural channel. Occasional repairs on the sewer substituted are no evidence of a voluntary assumption of the duty of maintaining it on the part of the city. It is not a case of dedication to public use, whereby the corporation becomes bound to repair by adopting it, so that the making of the repairs becomes evidence of adoption. And the corporation is not liable for damages done to lot-owners by the falling in of the old sewer, unless caused by the negligence of their agents in connecting their sewer with the old one, or in not keeping their own sewer in order, or in bringing into the old sewer such an additional quantity of water as to gorge and break it.⁶ So a municipal corporation is not liable for the destruction of a building in order to stop the progress of a

¹ *Crawford v. Village, &c.*, 7 Ohio, N. S. 459.

² *Hanvey v. Rochester*, 35 Barb. 177.

³ *Hart v. Brooklyn*, 36 Barb. 226.

⁴ *Hart v. Brooklyn*, 36 Barb. 226.

⁵ *Barry v. Lowell*, 8 Allen, 127.

⁶ *Munn v. Pittsburgh*, 40 Penn. 364.

fire, except by virtue of an express statute.¹ Nor, independently of statute, for injuries done by a mob.² So, although the officers of a city are appointed by a corporation, they are *quasi* civil officers of the government, and are personally liable for malfeasance or nonfeasance in office, but for neither is the corporation responsible.³ Upon these grounds, where the corporation of a city, by virtue of a power granted, but not wantonly or unnecessarily, caused to be opened a ditch, sewer, or culvert within and upon the sidewalks thereof; held, that an action could not be sustained by one whose property had sustained damage in consequence of the work.⁴ More especially, a city is not liable to an individual for the insufficiency of its public sewers, when the damages result directly from his use or occupation of it for his private advantage and convenience.⁵ Nor for grading a street, and turning the water from a natural gully upon the land of the plaintiff, causing him great injury.⁶ So the city of St. Louis was held not liable, for digging a ditch by authorized agents, under her proper ordinances, injurious to another, if not done carelessly.⁷ So where a municipal corporation proposes to build a new bridge on the site of an old one, but on a new plan, by which backwater will injure the plaintiff's mill; as the authority which the corporation attempts to exercise is of a public nature, and lawful in its character, private rights and interests are subordinate, and the loss is *damnum absque injuria*.⁸ So under the charter of the city of New York the corporation have power to establish markets, wherever, in their judgment, the interests of the city may require. And any necessary obstruction to the use of the street by adjoining proprietors, caused by necessary repairs of a market-house, is no ground for an action for a loss of profits in trade by such proprietors, and the degree of obstruction is a question for the jury.⁹ (a) So a town, which has assumed the duties of school districts, is not liable for an injury sustained by a scholar, attending the public school, from a dangerous excavation in the school-house yard, owing to the negligence of the town

¹ *Correas v. San Francisco*, 1 Cal. 452.

² *Prather v. Lexington*, 13 B. Monr. 559. See *Blodgett v. Syracuse*, 36 Barb. 526.

³ *Prather v. Lexington*, 13 B. Monr. 559; *Stewart v. New Orleans*, 9 La. Ann. 461; *Lewis v. New Orleans*, 12 Ib. 190.

⁴ *White v. Yazoo*, 27 Miss. 357.

⁵ *Dermont v. Detroit*, 4 Mich. 485.

⁶ *St. Louis v. Gurno*, 12 Mis. 414.

⁷ *Lambar v. St. Louis*, 15 Mis. 610.

⁸ *Ely v. Rochester*, 26 Barb. 133.

⁹ *St. John v. New York*, 6 Duer, 315.

(a) As to the liability of a city for a defect in a market-place; see *Baltimore v. Brannan*, 14 Md. 227.

No action lies, where the injury was

caused by the plaintiff's falling into a hole in a former market-place, which had ceased to be an authorized market. *Ibid.*

officers.¹ More especially, where by statute a district surveyor is elected by the people, the city, not having control of such officer, is not liable for damages resulting to a land-owner from his negligence in locating the line of lots, whereby the owner was compelled to rebuild a house after it was partially erected. And it is not a duty incumbent upon cities, in their corporate capacity, to provide for the survey of lots. Nor are they responsible for the negligence or unskilfulness of the surveyor employed.² (a)

¹ *Bigelow v. Randolph*, 14 Gray, 541.

² *Alcorn v. Philadelphia*, 44 Penn. 348.

(a) The default or neglect in taking a replevin bond, which makes a constable liable, is the criterion also of the liability of the town for him. *Bank, &c. v. Rutland*, 33 Vt. 414.

Under the Street Improvement Statute, and an agreement in this case between the city and the contractor which followed the statute, the contractor was to be paid only from the money collected by assessment upon the abutters; the city, by the statute, were required not only to lay the assessment, but also to use due diligence to make it productive. The city laid the assessment, issued a warrant to the collector, who duly advertised and offered the lands at auction according to the statute, which provided that they should be struck off to the bidder who would pay the amount due, and take the land for the least number of years. Some lots were struck off to *bonâ fide* purchasers, and the money realized was properly applied; no one bid on the other lots, and they were struck off to the contractor; neither he nor the assignees of his claim were present, or had authorized any bid on their behalf; the officer afterwards notified them, and offered to make them a deed, upon payment by them of the amount due by indorsement thereof on the engineer's certificate. In a suit against the city for alleged negligence in not collecting the assessment, it was held, that the city, having advertised for twelve weeks, had performed its duty; and that although, upon non-payment by the contractor for the lots sold by him, the city might have resold them, it was not bound to do so, especially as the contractor or his assignees might have taken the deed and availed themselves of any advantage to be expected from a resale. *Richardson v. Brooklyn*, 34 Barb. 569.

Some of the latest cases upon this subject are as follows:—

A corporator may sue a municipal corporation in an action of tort. *Savannah v. Cullens*, 38 Geo. 334.

A city may make sewers. But it is liable for any nuisance caused by the construction of such sewer to prevent another nuisance. *Clark v. Peckham*, 9 R. I. 455.

A municipal corporation, in constructing sewers and keeping them in repair, acts ministerially, and is bound to the exercise of needful prudence, watchfulness, and care. *Barton v. Syracuse*, 36 N. Y. 54.

The authorities of a city, by its charter authorized and directed to construct and maintain sewers, accepting and entering on the performance of this duty, and assessing the expenses on the property benefited, are liable for damage arising from their carelessness or negligence in such performance. *Ibid.*

Municipal corporations sustain the same liability with respect to individual property holders, as private individuals with reference to coterminous owners; as where a city, in fixing the grade of a street, turns water or mud on one's grounds or cellar, or creates an unwholesome, stagnant pond. *Aurora v. Reed*, 57 Ill. 29; *Nevins v. Peoria*, 41 Ill. 502.

A city, keeping a wharf and charging for the anchoring of boats, is bound to protect the boats against the dangers of ordinary floods. It is liable to the owner, who has paid the wharfage, for loss of a boat while fastened to the wharf, if occasioned by its not furnishing proper fastenings. *Shinkle v. Covington*, 1 Bush, 617.

The duty of a municipal corporation, to keep in safe condition the pavement of a market which it owns, is a private duty, from which it is not excused by the fact that it has not sufficient funds in the treasury to make even more important repairs in the public streets. *Savannah v. Cullens*, 38 Geo. 334.

It seems, a city, that under its charter has the right to make by-laws for the cultivation and preservation of the trees in its streets and public squares, and has made by-laws for the punishment of any one who should cut or injure such trees,

§ 3. A very frequent form, of the alleged liability of a corporation for tort or wrong, is found in the case of a charter, granted for some specific purpose of public or private improvement, and involv-

is liable for damages received by the plaintiff by a limb falling upon him when in a public park. *Jones v. New Haven*, 34 Conn. 1.

A municipal corporation, to which premises are leased, is liable for injury done to them by its servants while in possession. *Witt v. New York*, 5 Rob. (N. Y.) 248. See *Witt v. Mayor*, 6 Rob. (N. Y.) 441.

The city of Richmond was held responsible for the value of the liquor destroyed under the order and pledge of the common council, passed April 2, 1865, in anticipation of the evacuation by the Confederate army. *Jones v. Richmond*, 18 Gratt. 517.

By the act of 1866, for the improvement of the Albany basin, the contracting board were authorized, under direction of the canal board, to enlarge the openings at the north and south ends of the basin, as proposed, and laid down on a map referred to. For this purpose the sum of \$85,000 was appropriated. Sect. 6 provided, that the State should not be liable for damage caused by such improvements, but any claim should be paid by the city of Albany, &c. Held, the sum to be paid by the State would necessarily embrace all proper, ordinary expenses, including payment for lands which might be appropriated; sect. 6 was designed to include damages and injuries not comprehended in the other provisions, and authorized an action against the city for undermining a building, and cutting off its principal means of communication with the city, by taking away the bridge across the south end of the basin, and thereby diminishing the value of the lot. *Coster v. Mayor*, 52 Barb. 276.

Notice of a nuisance on land belonging to a city, given to the clerk, is insufficient; but a notice to the mayor, and a request to remove it, binds the city. *Nichols v. Boston*, 98 Mass. 39.

Upon the ground, that public functionaries should not be held liable for injuries caused by act or neglect of which they themselves were ignorant; where, in an action against a municipal corporation for injury to a building by a mob, an erroneous judgment was entered by a wrong estimate of a life-estate computed by the Carlisle annuity tables, through

the inadvertence of the counsel of the corporation; the court granted relief, even after the denial of a motion for a new trial and entry of judgment. *Greer v. New York*, 4 Rob. 675. See *Moody v. Board*, 46 Barb. 659.

Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence, or omissions of their agents. But, in the discharge of ministerial or specified duties assumed in consideration of the privileges conferred by their charter, they are liable, even in the absence of special rewards or advantages. The city of Richmond was held not responsible for the loss of a slave admitted into the city hospital, on the ground of the negligence of its agents at the hospital. *Richmond v. Long*, 17 Gratt. 375.

Where a city causes a sewer to be constructed with reasonable care and skill; it is not liable for consequential injuries resulting therefrom. *Indianapolis v. Huffer*, 30 Ind. 235.

Municipal corporations are not liable for the torts of persons appointed by them under a statute, which prescribes the duties of such persons, and provides a penalty for non-performance. *Sutton v. Board*, 41 Miss. 236.

One injured, while aiding the police officers of a city, at their request, made in accordance with a city ordinance, in arresting violent disturbers of the peace, cannot sustain an action against the city for such injury. *Cobb v. Portland*, 55 Me. 381.

A municipal corporation is not liable for an injury sustained by the carelessness of a teamster, who was engaged in transporting stone, under the direction of the superintendent of streets, to macadamize a street in the city. *Barney v. Lowell*, 98 Mass. 570.

Where there is no competent evidence, that a city has duly exercised any authority, under the statute authorizing the appropriation of money for celebration of the Fourth of July, or that any one was duly empowered to purchase fireworks in behalf of the city; the city is not responsible to a person wounded by a rocket bought by a committee of the city council, and negligently fired under their direction in celebrating the day. *Morrison v. Lawrence*, 98 Mass. 219.

ing the doing of certain acts connected with individual property, by the neglect or improper performance of which such property is injured. A corporation, formed for private emolument, though incidentally beneficial to the public, is not so far a public body as to entitle it to the exemptions of a servant of the State.¹ Thus a private person or a company, having a right to levy tolls in respect of the performance of a particular work, will be liable for performing it improperly. So although obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work and the possible future benefit of the public; and the funds thus obtained must discharge that liability.² So a company, who for their own profit undertake to maintain a delph or drain for carrying off water, are responsible for damage done to the occupier of adjoining land by the bursting of a bank of the delph after an unusual rainfall, though the mischief would not have happened but for the neglect of persons whose duty it was to keep the outlet of certain dimensions, whereby the water in the delph was penned back.³ So the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, empowering the district board to demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay the foundation, does not authorize them so to act, without first giving the party notice and an opportunity of being heard; and if they so act, an action will lie for damages against them.⁴ So one injured by the decay of sea-walls, which a corporation is directed to repair, under a grant from the crown, conveying a borough, and pier or quay, with tolls, to the corporation, may sue the corporation for damages.⁵

§ 4. Although the statute itself prescribe a remedy for parties injured, yet a common-law liability may arise, upon which an action on the case may be maintained. (See vol. i. p. 110.) Thus an act of Parliament constituted a company, for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be law-

¹ *Tinsman v. Belvidere, &c.*, 2 Dutch. 148; *M'Carthy v. Metropolitan*, L. R. 7 C. P. 508. See *Carson v. Bassett*, 2 Nev. 249.

² *Mersey v. Gibbs*, 3 Hurl. & Colt. 1035.

³ *Harrison v. Great*, 3 Hurl. & Colt. 231.

⁴ *Cooper v. Wandsworth*, 14 C. B. N. S. 180.

⁵ *Henly v. Mayor, &c.*, 4 Bing. 91.

ful for the company to do so, and to keep the same till payment made of the expenses for so doing. Held, the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care to prevent danger to the navigation; and therefore they were liable in case, for neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. Also, that such duty need not be expressly alleged; but only facts from which the duty can be necessarily implied.¹

§ 5. So the provisional committee of a water-works company agreed with the plaintiff, on his withdrawing his opposition to their bill in Parliament, to purchase lands for the works at a fixed sum per acre, including damage for severance, and, in addition, to pay for any damage the plaintiff should sustain, from the water of the company being near his house or buildings, and also to make good to the plaintiff or his tenants all loss or damage to any property belonging to or in the occupation of him or them, which the company might not purchase (except damage occasioned by severance), whether caused by the order or neglect of the company; the damage to be assessed by certain arbitrators. The local act was obtained, and it incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid, and the compensation-money under the above heads was ascertained by the arbitrators, and paid to the plaintiff. The plaintiff subsequently brought an action against the company, for taking so little care of a reservoir, that the water oozed out over the plaintiff's land, causing offensive smells and vapors, and rendering his buildings damp and unwholesome, and permanently injuring them, and for obstructing a drain and thereby penning back the sewerage of the plaintiff's house; and, further, because a drain, whereby the plaintiff's adjoining house and lands were drained, was interrupted and rendered useless, and the defendants neglected to substitute another drain according to their duty, whereby the plaintiff's house and lands were insufficiently drained; and also for cutting a channel across, and thereby, and also by means of the defendant's reservoir and works, depriving the plaintiff of the use of an agricultural road, forming a communication between lands of the plaintiff, and for not substituting another road in lieu of it; and

¹ *Lancaster, &c. v. Parnaby*, 3 P. & D. 162.

also, by the reservoir and works obstructing a public foot-path and depriving the plaintiff of the use of it, and thereby causing him particular damage and inconvenience. Held, that the action was maintainable, the damages not being those directed by the act to be settled by arbitration, or such as were contemplated by, or within the scope of, the agreement. So, although the defendants had no notice that the interrupted drain was for the drainage of the plaintiff's house, or that the plaintiff required any substituted drain; and although the plaintiff had not required any way to be substituted for the occupation road. But that a claim for raising the level of a stream, so as to check its accustomed speed at the place where it arrived at the plaintiff's lands, might be a loss included in the arbitration; and that a plea of an award of a certain sum therefor was good in part, although it professed to cover some of the other claims, to which it was no answer.¹

§ 6. But, in general, the remedy prescribed by the statute is held to be exclusive. Thus, in 1793, a corporation was created, with power to make a navigable canal from Merrimack River to Medford, and for that purpose to appropriate private property; and, in order that no person might be damaged by their diverting watercourses or flowing his land, a special mode was pointed out, for ascertaining and securing payment of such damages:—the corporation to take a prescribed toll; and if, in ten years, it should not be completed so far as to be passable, the act to be void. By two subsequent acts, the corporation were authorized to continue the canal to Charles River; and within the time last fixed, the canal was opened to public use and the toll taken. The corporation had erected a dam across a river, to form a feeder for the canal, and, after the canal had been open for more than twenty years, erected a new dam, just below the first one, but to a greater height, by which lands were overflowed and damaged. Held, there was no limitation of time for exercising the power to use the river for the necessary supply of the canal; that such limitation could not by necessary implication be deemed to have taken effect when the canal was first opened, because the necessity did not then cease; and, if the like power was necessary to the continued use of the canal, as it was originally made or had since been made, without objection on the part of any person interested, the power also must continue, and of the public necessity and expediency of using this power, the corporation were constituted the judge; and,

¹ *Cawkwell v. Russell*, 38 Eng. L. & Eq. 351.

consequently, that the owner must pursue his statutory remedy, and could not maintain an action at common law.¹

§ 7. But a public corporation, executing its work with reasonable care and skill, is not liable for any incidental damage thereby occasioned.² And, in order to charge a corporation for negligence in the performance of a public work, the law must have *actually*, not merely in form, imposed a duty or conferred an authority to do such work. Hence, where the officers and agents of a city corporation assumed to build a bridge, under the authority of a statute not constitutionally passed for want of a two-thirds vote, and the bridge fell in consequence of the negligent construction thereof; held, the corporation was not liable to an action at the suit of a person injured by the accident.³

§ 8. A canal act provided, that the canal company should not be entitled, on purchasing lands for making a canal, to any coal-mines, &c., under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal; and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners. Held, that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the company, the latter did not purchase out their rights, and that, the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing.⁴ Otherwise, where the canal act provided, that, in working such mines, no injury should be done to the canal.⁵ Or where the house of one claiming under a grant from the owner of the soil was undermined by him.⁶

§ 9. In the same connection, we may refer to the rights and liabilities of *individuals*, in reference to injuries done to private property, by means of acts which they are authorized by statute to perform. The privilege and duty created by such statute are analogous to those growing out of a corporate charter.

§ 9 *a*. One question in relation to this subject has been, whether such liability is joint or several. Thus where, by statute, the in-

¹ Sudbury, &c. v. Middlesex, &c., 23 Pick. 36. See vol. i. p. 110.

² Lawler v. Baring, 56 Me. 443; Horn v. Baltimore, 30 Md. 218.

³ Mayor, &c. v. Cunliffe, 2 Comst. 165.

⁴ Wyrley, &c. v. Bradley, 7 E. 368.

⁵ Ibid.

⁶ Earl of Lonsdale's case, cited Ib. 371.

habitants of the hundred were to make satisfaction for damages occasioned by the acts therein mentioned; held, the action must be against all the inhabitants.¹ But, by a turnpike act, trustees were appointed, with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. It was also provided, that all actions, for any thing done in pursuance of the act, should be brought within six months after the doing the thing complained of. A drain was cut, by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed; and an action was brought against one of the trustees only, more than six months after the act done, and the first injury sustained, but within six months after a subsequent injury accrued. Held, that the action, if it could have been supported at all, was well brought against the defendant only; but that the trustees, having acted to the best of their skill, and with the best advice, were not answerable.²

§ 9 *b*. The defendants, in execution of public works which they had contracted with the lords of the admiralty to execute, and under their authority, drove piles in the bed of a public navigable river. After the works were completed, and a reasonable time to remove the piles had elapsed, the defendants sold them to J., who cut them off, and, the surrounding soil being washed away, parts of the piles protruded above the bed of the river. The plaintiff's barge, whilst lawfully navigating the river, struck upon the piles, and was injured. If the piles had not been cut, the damage would not have happened without gross negligence. Held, the defendants were not liable.³

§ 10. By the General Turnpike Act, the trustees of roads were authorized to divert, shorten, alter, or improve the course or path of any roads, through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby. Held, that the trustees were authorized to lower hills and raise hollows; and were not liable to an action for a consequential injury resulting therefrom.⁴

§ 11. By a local act (3 & 4 Vict. c. 55), commissioners were

¹ *Jackson v. Pearson*, 1 B. & C. 304.

² *Sutton v. Clarke*, 1 Marsh. 429.

³ *Bartlett v. Baker*, 3 Hurl. & Colt. 153.

⁴ *Boulton v. Crowther*, 2 B. & C. 703.

appointed for improving a navigation ; all their powers to be executed by the majority present at a meeting of not fewer than three. They were not to be personally liable on contracts made, or for damages incurred, in relation to any thing done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting duly held (November 12), resolved to accept a tender for executing works in pursuance of the act ; and their clerk thereupon drew up a contract according to the tender ; and it was afterwards (December 4) signed by the contractor. It purported to be made by A, B, and C, "being three of the commissioners" appointed for putting the act in execution, and recited the previous resolution ; but it did not appear (unless as before mentioned) that the contract was executed or sanctioned by the majority of a regular meeting. Held, that the contract, made in consequence of the above resolution, was a contract entered into by the commissioners in execution of their office ; and that they were liable, and might be sued in the name of their clerk, for damage negligently done by the contractor to third persons in execution of such contract. But where the contractor, in executing part of the work, the diversion of a creek, made a drain, which, from a defect in the materials, could not resist water ; and, without authority, turned in the water, which broke through and flooded the neighboring land ; and the drain was not finished at the time, but it did not appear that any thing further was about to be done for the purpose of securing it, if the mischief had not happened : it was held, that the defendant was not liable.¹

§ 12. By one clause of a local improvement act, power was given to commissioners "to cause the present and future streets, &c., and other public places to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner as they should think fit." By other clauses, the commissioners were authorized to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag the same, and, in case of their neglecting to do so, to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare the streets highways, and take upon themselves the future paving of them ; but not to alter the level of the streets. Held, they were not authorized to cut down a steep ascent, and greatly lower

¹ *Allen v. Hayward*, 7 Ad. & Ell. N. S. 960.

the level of the street opposite the plaintiff's house, but were liable in trespass.¹

§ 13. A statute, for making certain rivers navigable, gave the undertakers power to make new cuts, &c., for the purpose of improving the navigation, but required them to make compensation to the land-owners, according to the determination of commissioners, or agreement between the parties; but gave the undertakers no power to purchase lands, nor recognized in them any right of the soil in the beds or banks of the rivers. A river, mentioned in this act, was made navigable by certain undertakers, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation; but there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank. Held, such an agreement could not be presumed from these acts of ownership, when opposed to similar acts exercised by the occupier of the adjoining land; and that the act of Parliament afforded strong evidence against such presumption. Also, that evidence of acts of ownership and enjoyment, exercised by the undertakers on other parts of the line of the navigation, was inadmissible, to show their title to the *locus in quo*, unless unity of title and character, between the *locus in quo* and the other parts of the line of navigation, was previously established.²

¹ Brown v. Clegg, 6 Eng. L. & Eq. 334.

² Hollis v. Goldfinch, 2 Dowl. & Ry. 316.

CHAPTER XXXIX.

OFFICERS, ETC., OF CORPORATIONS.

§ 1. THE *officers* or *agents* of a corporation may be liable, for wrongs committed by them as such; (a) even though the company is itself responsible. Thus an act, providing that a town shall be liable for all illegal doings and defaults of one of its officers, does not necessarily exempt the officer himself from liability.¹ So a suit may be maintained against officers of a corporation, jointly, for the fraudulent over-issue of stock, by any stockholder injured thereby, through the depreciation of his stock. The remedy is not limited to a suit against the seller of the stock.² And it is no answer to an action of trover for bank-notes, that the defendant, as cashier of the bank, received them on special deposit.³

§ 2. But, in general, an action does not lie against individuals for acts done by them in a corporate capacity; at least, not without proof of malice.⁴ And if an individual stockholder has suffered damage, in a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation. He can maintain no action against the directors, who are themselves liable to the cor-

¹ *Rounds v. Mansfield*, 38 Me. 586.

² *Cazeaux v. Mali*, 25 Barb. 578. See *Granesutine's*, &c., 49 Penn. 310.

³ *Coffin v. Anderson*, 4 Blackf. 395.

⁴ *Harman v. Tappenden*, 1 E. 555.

(a) The *motive* of the action is immaterial. *Ramsey v. Gould*, 57 Barb. 398.

Officers and directors of a corporation cannot without fraud secure to themselves advantages not common to the stockholders. *Köhler v. Iron Co.*, 2 Black, 715.

In case of trust, the officer of a corporation may be held to strict responsibility for its performance, notwithstanding contrary directions from the corporation itself. *Wilkinson v. Stewart*, 30 Ill. 48; *Thompson v. Township, &c.*, 30 Ill. 99.

An action lies against the *members* of a corporation, by their private names, for a false return to a *mandamus* by their corporate name. *King v. Rippon*, 1 Com. 86.

In New York, where trustees of an unincorporated company, with others of the company, wrongfully and fraudulently convert property of the company, the other members can maintain an action against them all together for the value of the property; although it is averred that the defendants did not faithfully discharge their trust. *Dennis v. Kennedy*, 19 Barb. 517.

The members of a corporation are not personally liable in another jurisdiction, either for its debts or its torts, unless such liability is imposed by the terms of its charter, or in virtue of some positive law. *Merrick v. Van Santvoord*, 34 N. Y. 208.

poration.¹ Thus a stockholder in a bank cannot maintain an action against its directors, for their negligence in so conducting its affairs, that its whole capital is wasted and lost, and the shares therein rendered worthless; nor for the malfeasance of its directors in delegating the whole control of its affairs to the president and cashier, who waste and lose the whole capital.² So a holder of the bills of a bank cannot maintain an action against the directors, on the ground that their misconduct has rendered such bills worthless.³ So the members of the common council of a municipal corporation are not liable, either civilly or criminally, for acts done by them as such, in the exercise of a discretion confided to them by law, unless they act corruptly.⁴

§ 3. While a claim may be made against officers of a corporation by third persons, the officer or agent of a corporation is also liable *to the corporation* for all damages occasioned by the violation of his duties and obligations; and, for the most part, as has been stated, only to the corporation, not to the stockholders;⁵ the remedy of the latter being against the corporation itself.⁶ (a) In general,

¹ *Smith v. Poor*, 40 Me. 415. See *Mayor, &c. v. Eschbach*, 18 Md. 276; *Liv-ermore v. Freeholders, &c.*, 5 Dutch. 245.

² *Smith v. Hurd*, 12 Met. 371.

³ *Branch v. Roberts*, 50 Barb. 435.

⁴ *Baker v. State*, 27 Ind. 485.

⁵ *Bayless v. Orne*, 1 Freem. 175; *Franklin, &c. v. Jenkins*, 3 Wend. 130. See *Commercial v. Ten Eyck*, 48 N. Y. 305.

⁶ *French v. Fuller*, 23 Pick. 108; *Brown v. Vandyke*, 4 Halst. Ch. 795.

(a) The action of the officers of an incorporated company, without any violation of the charter or constitution of the company, cannot be disregarded or controlled by any court, at the instance of a stockholder, unless it is shown to have been a wilful abuse of their discretion, or the result of bad faith, or of a wilful neglect or breach of a known duty. Managers of a corporation, clothed with an enlarged discretion in regard to the management of its affairs, stipulate with the stockholders for no more than good faith and reasonable diligence; and mere errors of judgment on the part of such managers, do not entitle a stockholder to relief in a court of chancery. *Smith v. Prattville, &c.*, 29 Ala. 503.

But in equity, although the corporation may proceed against the officers or agents for misapplication of the funds, yet, if the directors collusively refuse thus to proceed, or if the parties in fault still control the company, and in cases of breach of trust, the parties in interest may proceed in their own names, making the corporation a defendant. *Robinson v. Smith*, 3 Paige, 233; 1 Freem. 173; 4

Halst. Ch. 795. See *Scott v. Depeyster*, 1 Edw. 513.

(Penn.) Supreme Court, in equity. *Spering v. Smith*. — The plaintiff was the assignee in trust for creditors of the National Safety Insurance Company. The bill was filed charging frauds in the management of the company, whereby the assets were wasted, and that the officers and directors participated in the fraud, or by supine and gross negligence allowed the frauds to be committed. The defendant Churchman ceased to be a director December 31, 1857; the assignment was made April 18, 1861. A bill was filed in the district court for the city and county of Philadelphia, January 14, 1867, when, the equity jurisdiction of that court being abolished, a new bill was filed in the Supreme Court on the 13th April, 1867.

Churchman demurred for the lapse of time.

Opinion by THOMPSON, C. J.: —

Directors in a corporation may in some sense be regarded as trustees for parties pecuniarily interested in its operations, but this results from the nature of the duties they are to perform. They are

the officers and agents of a corporation are liable for losses and defalcations caused by *neglect*, or the want of reasonable care and diligence.¹ Thus the officers of a bank are agents of the corporation, and are liable for an abuse of their trust, wherever the agents of an individual would be.² So, where an owner of a bill indorses it, and sends it to a bank for collection; the bank, having a special interest in it and in the proceeds thereof, can sustain an action against such agent as it may employ to collect it, for omitting to pay over the proceeds, or for default in charging the parties.³ So the payment of overdrafts, by a cashier appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty.⁴ So, where the treasurer of a corporation obtains permission to borrow the funds in his hands, upon giving his note with a mortgage, and he gives his note for them without the mortgage, he is not exonerated from liability as treasurer for the amount.⁵ So, although the general agent of a company is not responsible for bad debts, or for the negligence or faithlessness of agents necessarily employed by him, yet it is his duty to see that the debts to the company are col-

¹ *Percy v. Millaudon*, 3 La. 568; *Scott v. Depeyster*, 1 Edw. 513; *Pontchartrain, &c. v. Paulding*, 11 La. 41.

² *Austin v. Daniels*, 4 Denio, 299.

³ *Commercial, &c. v. Union, &c.*, 1 Kern. 203.

⁴ *Bank, &c. v. Calder*, 3 Strobb. 403.

⁵ *Bluehill, &c. v. Ellis*, 32 Me. 260.

not technically trustees. An attorney in fact bears a close resemblance to such a position, or perhaps an attorney-at-law is still nearer being an official representative. It is settled that in these cases the Statute of Limitations is applicable. Constructive trusts, it is well settled, are within the statute. 4 Barr, 56; 2 Grant, 273.

The trust claimed to exist in this case is of this nature, in my opinion. Nine years after the demurrant Churchman had ceased to be in the direction of the National Safety Insurance and Trust Company, he is called upon by this bill to answer an allegation of gross negligence in regard to the affairs of the company during some period of his official incumbency as director. This I regard as the charge. The bill sets forth that he and the directors participated in frauds, or by the most gross and culpable negligence permitted and encouraged corrupt and negligent dealings with and mismanagement of the moneys and assets of said company. The particulars of the fraud are not set out, and only the last branch of the alternative is sufficiently stated, if

indeed either be. This negligence was a breach of duty, and might have made the party liable on the instant, or certainly when discovered. But if parties, or the corporation, lie by nine years, without evincing that they have been injured, the Statute of Repose in a common law form would protect, and by assimilation so in equity. 2 Daniels, 43, 44.

If nine years would not protect, nineteen would not. Had he continued a director, it is probable a different rule would be applicable. If no statute or lapse of time will protect a party once a director, nobody ought to serve as such. In addition I see not any reason why the act of 28th March, 1867, should not apply in this case, although I do not place the case upon it. The demurrer to the bill by the defendant Churchman is sustained on the ground of the lapse of time alone, after he ceased to be a director and before bill filed.

Let judgment be entered for the defendant on the demurrer, and that the bill be dismissed as to him at the cost of the complainant. — Leg. Intell.

lected, and he must show that he exercised ordinary diligence for that purpose.¹ So where the officers of a bank purchase State stocks, to carry on a private undertaking, and sign a contract, obliging the bank to pay for the same, and then take money from the bank, to fulfil such engagement; they are liable for the money so taken to the receiver of the bank. And the assent of the president, who was the financial officer of the bank, does not protect the cashier from his liability to the bank.² (a)

§ 4. But officers of a corporation are not liable for mere *mistake*.³ So directors of a bank are not responsible for an injury to the bank, caused by their act, originating in an *error of judgment*, unless the act be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. And giving compensation to a member of the board of directors, for extra services as an agent of the bank, though unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefiting the bank.⁴ So a bank can recover no damages of its cashier, in an action for malfeasance, by showing that he has improperly transferred bonds belonging to the bank, and that a large balance of the purchase-money remains unpaid, if such brokers are abundantly able to pay, but the bank has made no attempt to collect it.⁵

¹ Williams v. Gregg, 2 Strobb. Eq. 297.

² Austin v. Daniels, 4 Denio, 299.

³ 1 Edw. 513; 3 La. 568; 11 Ib. 41. See Reed v. Conway, 26 Mis. 13.

⁴ Godbold v. Bank, &c., 11 Ala. 191.

⁵ Commercial v. Ten Eyck, 50 Barb. 9.

(a) A *public officer*, who holds securities deposited with him by a bank, is not liable to the bank for embezzling them,

unless the bank suffers pecuniarily by his act. State v. Dunn, 10 Ind. 269.

CHAPTER XL.

MASTER AND SERVANT; PRINCIPAL AND AGENT.

- | | |
|---|---|
| <p>1. Whether master and servant are <i>jointly, alternatively, or successively</i> liable.</p> <p>3. What constitutes a servant; action of trespass or case; negligence or wilful wrong; acts done in connection with the master's business; in his presence; liability by <i>ratification</i>.</p> <p>11. Distinction between a <i>servant</i> and a <i>contractor</i>; case of <i>Bush v. Steinman</i>.</p> <p>16. Liability of public officers.</p> <p>17. Of corporations, &c.</p> | <p>18. Liability for fraud of an agent or servant.</p> <p>20. Liability of a servant — to third persons.</p> <p>22. To the master.</p> <p>24. Liability of master to servant; case of <i>fellow-servants</i>.</p> <p>27. Actions by master and servant against third persons.</p> <p>28. Action by master for loss of service of the servant, &c.</p> |
|---|---|

§ 1. IN immediate connection with the subject of *joint* claims and liabilities, may be considered those which grow out of the common and familiar relation of *master and servant*, or *principal and agent*.

§ 2. It has been sometimes held, that master and servant may be joined as defendants in one action. As in an action for personal injuries caused by the negligence of a son, while driving the horses of his father.¹ So, in an action on the case for obstructing the plaintiff's lights, a clerk who superintended the erection of the buildings by which they were darkened, and who alone directed the workmen, may be joined as a co-defendant with the original contractor.² So a joint action of tort, in the nature of trespass, may be maintained against a corporation and its servant, for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation, although they might have been equally well discharged without the use of illegal or undue force.³ So a railroad company, authorizing the blasting of rocks by its contractors upon the proposed line of its road, is liable as joint wrong-doer with the contractors, for any damage done by fragments of stone to adjoining premises, although there was no want of care in the manner in which the work was done.⁴ And more especially may the injury be regarded as joint, where by agreement between the parties they are to be jointly interested in the

¹ Phelps v. Wait, 30 N. Y. (3 Tiffa.) 78.

² Wilson v. Peto, 6 Moore, 47.

³ Hewett v. Swift, 3 Allen, 420. See Severin v. Eddy, 52 Ill. 189.

⁴ Carman v. Steubenville, &c., 4 Ohio, 399.

property which is the subject of such injury. Thus, where A's negroes were purchased from a third person by B, on the joint account of himself and C; and, after notice of A's title, B sold the negroes for the benefit of himself and C; it was held, in trover by A against C, that the sale by B was a conversion by both B and C.¹ So it has been held that the sheriff is jointly liable with his deputy, though not present at the taking of the property.² (See *Sheriff*.) More especially, that a sheriff, who ratifies the wrongful act of his deputy, is liable to be sued with the latter as a joint trespasser.³ But case for deceit, in the nature of a conspiracy, cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone. Such action can be sustained, only where some affirmation or representation, wilfully false, or some designed and positively fraudulent artifice, is directly proved, or necessarily to be presumed from the circumstances attending the transaction itself, to have been made or perpetrated by the defendants jointly, by means whereof a damage resulted to the plaintiff.⁴ So an action on the case is held not to lie against a master and servant jointly, for a wilful injury done by the servant, whilst driving the carriage of the master, if such carriage be not employed in the conveyance of passengers, and the master be not present when the injury occurs.⁵ And when master and servant are joined, and joint negligence is the only foundation of the action, if the servant is acquitted, there can be no recovery against the master.⁶

§ 2 *a*. It is to be further remarked, that in some cases a party may *elect*, whether to proceed against the master or the servant. As where money is paid to a servant, and he misapplies it.⁷ So where one is injured by the explosion of a boiler, owned and worked by a corporation; he may maintain an action for negligence either against the corporation, its managing agents, or those who made or put up the boiler.⁸ And a party injured may sometimes proceed against the master and servant *successively*; and the latter has been held to be concluded and estopped by the result of proceedings against the former. Thus where, in an action of trover, the defendant justifies the taking by the command and

¹ *Guerrey v. Keston*, 2 Rich. 507. See *Thomas v. Womack*, 13 Tex. 580.

² *King v. Orser*, 4 Duer, 431.

³ *Waterbury v. Westervelt*, 5 Seld. 591.

⁴ *Page v. Parker*, 40 N. H. 47.

⁵ *Wright v. Wilcox*, 19 Wend. 343.

See *Parsons v. Winchell*, 5 Cush. 502.

⁶ *Montfort v. Hughes*, 3 E. D. Smith,

⁷ *Cary v. Webster*, 1 Str. 480.

⁸ *Losee v. Buchanan*, 61 Barb. 86.

under title of one A, he is to be regarded as a privy of A; and the record of a former recovery by the plaintiff against A for the same taking is admissible in evidence against the defendant; and is conclusive as to the plaintiff's title and right of possession.¹ (a) And, on the other hand, in an action for a trespass, committed by the defendant, as servant and by command of A, acceptance of satisfaction by the plaintiff from A is a defence.² In general, however, different forms of action are adopted against master and servant. Thus an action on the case, and not an action of trespass, is held the proper remedy for an injury done to the plaintiff's carriage, by the servant of the defendant negligently driving his carriage against it.³ (b)

§ 3. The rule of liability against a master, for the act of the servant, is held to be the same precisely, whether the servant is employed in the care and management of real or personal property, except perhaps in the single instance, where the act complained of, in respect to real estate, amounts to a nuisance.⁴ (c) In

¹ Calkins v. Allerton, 3 Barb. 171.

³ Morley v. Gaisford, 2 H. Black. 442.

² Thurman v. Wild, 11 Ad. & Ell. 453.

⁴ Simons v. Monier, 29 Barb. 419.

(a) An action against a master, for injuries done by his servant, is not defeated by the acknowledgment of the plaintiff in writing, but not under seal, made before a magistrate or police court, that he had received satisfaction, filed in a prosecution instituted against the servant, under (Mass.) Gen. Sts. c. 170, §§ 33, 34, when the latter has not been committed to prison or put under recognizance. The question should be left to the jury, whether there was any consideration for the acknowledgment. *Stevens v. Hathorne*, 12 Allen, 402.

(b) See *Trespass; Action on the Case; supra*, chap 3.

(c) The question has often arisen, what constitutes the relation of master and servant.

One who makes temporary use of the services of another's servant may be liable for the acts of such servant. *Wood v. Cobb*, 13 Allen, 58.

The same liability arises, though a person is not the owner or manager of a steamboat, and has no authority to hire, control, or discharge its employees; if it is navigated by him or for him. And if navigated by him or for him jointly with another person, the acts and negligence of such employees are in law those of him and his associates, jointly

and severally. *Fay v. Davidson*, 13 Minn. 523.

Evidence of a contract between the plaintiff and the defendant corporation, in which the plaintiff agreed to keep the defendant's horses and to furnish them hay and other things, and to board a man, in case the defendant should require a man to take care of the horses; and evidence that B was in the defendant's employ, and that he was sent to take care of the horses by another of the defendant's servants and in accordance with the recommendation of the defendant's general superintendent; is sufficient to leave to the jury the question whether B was the defendant's agent, while furnishing hay to the horses, and consequently rendered the defendant liable for B's negligence. *Stone v. Western*, 38 N. Y. 240.

The defendant, having hired a horse and carriage from the plaintiff, intrusted the horse to A, the servant of B, an innkeeper, to be fed. In consequence of A's not replacing the bit, the horse became unmanageable, and the horse and carriage were damaged. Held, A was to be considered as the defendant's servant, and the action was maintained. *Hall v. Warner*, 60 Barb. 198.

A gas company, having been notified

general, a master is liable for the *fault* or *negligence* of his servant, (a) in distinction, as is sometimes held, from his *wilful* or *criminal wrong*; ¹ (b) or an act of wanton or thoughtless

¹ Jones v. Hart, 2 Salk. 440; Gass v. Coblenz, 43 Mo. 377; Lee v. Sandy, 40 N. Y. 442; Enos v. Hamilton, 24 Wis. 658; Dougherty v. Wells, 7 Nev. 368; M'Guire v. Grant, 1 Dutch. 356; Coleman v. Riches, 16 Com. B. 104; 29 Eng.

L. & Eq. 323; Mitchell v. Mims, 8 Tex. 6; Fergusons v. Terry, 1 B. Monr. 96; Brooks v. Olmstead, 17 Penn. 24; Grant v. Norway, 10 Com. B. 665; Hubbersty v. Ward, 8 Exch. 330; Wesson v. Sea-board, &c., 4 Jones, 379.

that gas was escaping from pipes which it had introduced into the cellar of a house at the request of A., the occupant, sent S., one of its servants, to ascertain where the leak was. He lighted a match in the cellar, and caused an explosion, which severely injured A.'s child, seven years old, who was in the house. Held, an action by the child against the company should be sustained, although the pipe was put in by the plaintiff's father, as the duties of S. extended to finding the leak, and the accident originated in the improper method of examination. Lannen v. Albany, &c. Co., 46 Barb. 264.

Where money was sent by express to B., in care of K., with the consent of B., and K. delivered the money to F., who absconded with it, and the jury found that F. was not the agent of the person sending the money: held, it must be taken that B. consented that K. should act for him; and that the person sending the money was not responsible if K. failed to deliver the money to the right person. Sykes v. Bates, 26 Iowa, 521.

V. was a passenger on a street horse-car, and, on its arrival at a point of intersection with a steam railroad, the crossing was occupied by a train of steam-cars, and the horse-car stopped to wait the passage of the train. After the train had crossed the street, the flagman of the steam railroad signalled the driver of the car to go forward, and he did so, and at the same time the train backed and struck the car before it had quite crossed the track, injuring V. Held, in an action against the horse-railroad, the fact, that the driver had been directed to obey the signals of the flagman, and did so obey them, did not make the flagman an agent of the horse-railroad. Chicago v. Volk, 45 Ill. 175.

One receiving his share of the crop for work on land is not a servant. Burgess v. Carpenter, 2 S. C. 7.

See, further, Killion v. Power, 51 Penn. 429.

f., (a) More especially is the master liable, if himself guilty of the negligence

which causes the injury. Thus a master is liable for an accident resulting from the breaking of the chain-stay of a cart driven by his servant, on account of his negligence in not having the tackle good. Welsh v. Lawrence, 2 Chitty, 262.

(b) Case is an appropriate remedy for injuries caused by the wrongful acts of a servant of the defendant, even though such acts have been acts of force, and such that trespass would have been the only proper remedy against the servant. Havens v. Hartford, &c., 28 Conn. 69.

Thus a master is held not liable in trespass for the wilful act of his servant by driving his master's carriage against another, done without the direction or assent of the master. M'Manus v. Crickett, 1 E. 106. (For a criticism upon this case, see Redf. on Railw. 381, n. Also, Howe v. Newmarch, 12 Allen, 49.)

If a servant, while felling trees by the orders of his master, and in the scope of his business, trespass upon another's land, either wilfully or negligently, the master is liable. Luttrell v. Hazen, 3 Sneed, 20.

A railroad is liable for the torts of its agent, while engaged in the performance of his duties, but not for his wilful or criminal acts. De Camp v. Mississippi, &c., 12 Iowa, 348.

Trover lies against a master, for goods delivered to his apprentice, and wrongfully converted by him. Armory v. Delamirie, 1 Stra. 505.

In reference to the peculiar nature of the master's liability, for injuries caused by the driving of animals and the use of carriages, and the distinction between the actions of trespass and case, as applied to this class of injuries, it is said: "Liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless the act was done by his command; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by

mischief, done by a servant who is not at the time engaged on the master's business.¹ It has been sometimes held, that the injury must arise in the course of the execution of some service lawful in itself, but negligently or unskilfully performed; and not be a wanton violation of law by the servant, although occupied about the business of his employer.² But a later case, more conformable to the current of recent decisions, holds that a master is not responsible for a tort done by his servant, if done without his authority, and not for the purpose of executing his orders or doing his work, but wholly for a purpose of the servant's and not within the scope of his employment. But if done in executing this authority and for the purpose of fulfilling the master's directions, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner.³ It must appear, either that the master commanded the unlawful act, or that the injury resulted from the negligence of the servant, while he was actually employed in his master's service.⁴ Or that the injury was the natural and probable result of the orders given to the servant.⁵ It is held to make no difference, that the servant was instructed to do the act carefully.⁶ Thus the owners of a tow-boat are liable for all damages occasioned by the negligence of their agent who has charge of the boat, where the parties have not agreed to the contrary.⁷ So one whose servant carelessly throws a keg out of a window, so

¹ *Weldon v. Harlem, &c.*, 5 Bosw. 576; *Snodgrass v. Bradley*, 2 Grant, 43.

² *Moore v. Sanborne*, 2 Mich. 519. See *Cantrell v. Colwell*, 3 Head, 471.

³ *Howe v. Newmarch*, 12 Allen, 49; acc. *Evansville v. Baum*, 26 Ind. 70.

⁴ *Douglass v. Stephens*, 18 Mis. 362.

⁵ *Thames, &c. v. Housatonic, &c.*, 24 Conn. 40.

⁶ *Oliver v. Northern*, 3 Oreg. 84.

⁷ *Ashmore v. Pennsylvania, &c.*, 4 Dutch. 180.

a physical necessity to the act complained of. But when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master are placed in the care and under the management of a servant or rational agent. In all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent." *Sharrod v. London, &c.*, 4 Exch. 580.

The plaintiff's horse, in charge of his servant, who was guilty of no negligence, was killed by reason of a span of horses belonging to the defendant, which had run away with his coachman, running against a feed wagon. Held, although the defendant's servant was guilty of no fault or negligence, yet the defendant was liable, if the servant caused the injury by running against the wagon, though solely with a view to his personal safety, provided the act was a prudent one for the purpose of stopping the defendant's horses. *Wolfe v. Mersereau*, 4 Duer, 473. See *Barnes v. Hurd*, 11 Mass. 57; *Gates v. Miles*, 3 Conn. 64; *Adams v. Hemmenway*, 1 Mass. 145.

as to injure a passer-by, is liable, whether the passer-by was on a public or private way, or whether he was passing in the exercise of a public right, or upon mere permission of the defendant.¹ So parties employing a travelling agent are liable for his negligence in the use of a carriage, in which he travelled upon their business, although he did not make known his employers.² So the owner of a house gave a general direction to his servant, to clear the snow from the roof, which was done by throwing it into the street, whereby a man was killed. In an action under the statute for damages resulting from the death, held, the act was dangerous to human life and grossly negligent, and, as the master had intrusted the performance of the service to the servant, he was responsible for the manner in which the service was performed, either by the servant or by a person whom he had employed to assist him.³ But, on the other hand, a steamboat of the plaintiffs took fire in the night, while fastened by the plaintiffs' cable to the defendants' wharf, upon which stood an old wooden freight-house; but, before the house was in danger, and while the fire could have been extinguished, the cable was cut by the defendants' watchman, without any express authority, and the boat drifted away and was burned. Held, the defendants were not liable to an action of trespass.⁴ So it has been sometimes held, though this can hardly be considered the prevailing rule, that, if the servants of a railroad company, exceeding their authority, unlawfully expel a passenger from the cars; the company is not liable;—nor for any unnecessary violence in ejecting a passenger.⁵ (a) So an incorporated district is not liable

¹ Corrigan v. Union, 98 Mass. 577.

² Pickens v. Diecker, 21 Ohio St. 212.

³ Althorf v. Wolfe, 2 Hilt. 344.

⁴ Thames, &c. v. Housatonic, &c., 24 Conn. 40.

⁵ Hibbard v. New York, &c., 15 N. Y. 455. See Higgins v. Watervliet, 46 N. Y. 23; Goddard v. Grand, 57 Me. 202; Coleman v. N. Y., 106 Mass. 160.

(a) See chap. 36, *Railroad Corporations*. But it is held no defence to an action against a railroad for detention, that it was caused by the wilful act of the conductor. Weed v. Panama, &c., 17 N. Y. 362.

Where the misconduct of the agent, whether wilful and malicious, or merely negligent, causes a breach of the obligation or contract of the principal, the principal is liable. Milwaukee, &c. v. Finney, 10 Wis. 388.

Though the form of action is tort instead of contract; the liability and rule of damages are the same. Ibid.

See Smith v. Webster, 23 Mich. 298; Wade v. Thayer, 40 Cal. 578; Little v. Wetmore, 19 Ohio St. 110; Coomes v. Houghton, 102 Mass. 211.

In the late case of Bryant v. Rich, 106 Mass. 180, a verdict for \$8000 damages was sustained, in an action brought against the owners of a steamboat for an assault and battery committed by their steward and table-waiters upon the plaintiff, a passenger, on his making a proper remark upon their rudeness to his relative, a fellow-passenger, in reference to a meal.

in trespass, for the illegal seizure of a horse of the plaintiff, by one of its officers, on account of an alleged violation of one of its ordinances, which did not in fact take place; unless the corporation previously authorized or subsequently ratified the seizure.¹ So the distinction is made, that where the defendant's servant, wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable.² But, as already suggested, the master's exemption from liability is subject to the twofold proviso, that the act was not done in the master's name and for his benefit, and that he did not assent to or ratify it, with a full knowledge of the facts.³ (a) It is said: "He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit; and then his agreement subsequent amounteth to a commandment."⁴ "An act done for another, by a person not assuming to act for himself but for such other person, though without any precedent authority, becomes the act of the principal, if subsequently ratified by him, whether it be for his detriment or his advantage."⁵ If the master sanction and appropriate the proceeds of a trespass committed by his agent, of which he had knowledge at the time, he is liable therefor.⁶ But where, to trespass for taking the plaintiff's horse, the defendant pleaded, first, not guilty; and, secondly, that the horse was *damage feasant* on his land; and the horse was proved to have been wrongfully distrained by the servant of the defendant

¹ Fox v. Northern Liberties, 3 W. & S. 103.

² Croft v. Alison, 4 B. & Ald. 590.

³ Fox v. Jackson, 8 Barb. 355; Vanderbilt v. Richmond, &c., 2 Comst. 479; Van Brunt v. Schenck, 13 Johns. 414; Fitzsimmons v. Joslin, 21 Vt. 229; 1

Pars. on Cont. 47, n.; Wallace v. Morgan, 23 Ind. 399.

⁴ 4 Inst. 317.

⁵ Wilson v. Tumman, 6 Man. & Gr. 236; Byram v. McGuire, 3 Head, 530.

⁶ Exum v. Brister, 35 Miss. 391.

(a) It has been doubted (2 Greenl. Ev. § 68) whether there can be a trespass by ratification.

Where the trespass consisted in cutting timber, evidence that the agent had made and was fulfilling a contract on the part of the principal to sell timber, and that the timber cut was delivered in pursuance of that contract, is admissible, to show that the trespass was committed in the course of his business, so as to render the master liable. 35 Miss. 391.

The principle stated in the text has been applied so far, as to exempt the ser-

vant from liability, for acts approved and adopted by government. Thus, in trespass by a slave-dealer, resident and carrying on his trade on the coast of Africa, against a commander in the British navy on that station, whose duty it was to enforce a treaty with Spain for suppression of the slave-trade, for carrying off slaves of the plaintiff; the defence was, not any previous authority to do the act, but an alleged subsequent ratification by the government. Held, the action could not be maintained. Buron v. Denman, 2 Exch. 167.

on the highway, and not on his land: held, no *prima facie* case was made out, that the defendant had authorized the distress, by proof that he had on other occasions authorized his servant to distrain cattle *damage feasant* on his land; and that he had not adopted the act of his servant by pleading a justification of it.¹ And the rule requiring approval or adoption by the master more especially applies, where the party doing the act was not the *immediate* servant of the defendant. Thus the plaintiff's boat was run into and damaged by the wilful act of the captain of the defendant's boat. The trespass was also sanctioned and approved by the president of the defendant corporation, and the general agent and manager of its business. Held, the corporation was not liable for the collision.² (a)

§ 4. A master may be held liable as a trespasser, for the act of his servant done *in his presence*. Thus trespass lies against a master, where, while the servant drives him in a gig, the horse runs away and does damage.³ So the defendant and others hired for a day's excursion a carriage and post-horses, driven by postilions, who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavoring to force their way into a line of carriages, overturned a gig, and injured the plaintiff. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened. Held, that he was liable in trespass.⁴ And, under similar circumstances, an action on the case may also be maintained. Thus A borrowed of the plaintiff a horse and chaise, and went in it, accompanied by B, on an excursion of pleasure, B

¹ Lyons v. Martin, 3 Nev. & Per. 509; 8 Ad. & Ell. 512; S. C. Wil., Wol. & Hodg. 149. See Bayley v. Manchester, L. R. 7 C. P. 415.

² Vanderbilt v. Richmond, &c., 2 Comst. 479.

³ Chandler v. Broughton, 3 Tyr. 220; Byram v. M'Guire, 3 Head, 530.

⁴ M'Laughlin v. Fryor, 4 Man. & Gr. 48.

(a) A clerk in a store, in the absence of his principal, employed his general agent to carry off goods, belonging to another, in the principal's wagon, and sell them, contrary to the principal's orders; but the principal approved the act of the agent, and received pay for the use of his wagon and team, and for the services of the agent. Held, that this did not bind the principal to account for money received by such agent, and not paid to the owner of the goods. Hodges v. Holderby, 4 Jones, 500.

In Massachusetts, a horse-railroad company may be held liable for double the amount of damages sustained from the bite of a dog, kept by their servants or agents. If there is evidence, tending to show that the dog was kept about their stable, by a person employed by them to have charge of the stable, and with the knowledge and implied assent of their superintendent; the jury may properly find that the dog was kept by the company. Barrett v. Malden, &c., 3 Allen, 101.

driving. By B's mismanagement, the horse and chaise were driven against and injured the plaintiff's horse. Held, that an action on the case might be maintained for the injury against A, on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned.¹

§ 4 *a*. But the owner of a dog is not liable for his servant's setting the dog on cattle, though the master stood near, unless done by his command; more especially if he called off the dog, as soon as he was informed of the act.²

§ 4 *b*. And it is to be observed, in reference to the proof of authority to do a wrongful act, that, where it is sought to charge A for the wrongful act of B, done at his request and by his direction, it is not competent to inquire of B, whether he would have done the injury had he not *understood* from A that he would pay the damage, and whether he did the act with the understanding from A that he would pay the damage. The understanding of B can be learned only from the transaction itself, including what was said between A and B in relation to it, and all the accompanying circumstances. It is to be inferred from such evidence, and the inference belongs exclusively to the court. And it is at least necessary, in order to charge A, that he said and did what would amount to a request or direction; and from which it might be inferred that it was so understood both by A and B.³

§ 5. With regard to that class of wrongs for which, as above explained, a master is responsible, it is said, the legal maxim, *respondeat superior*, is bottomed on this principle, that he who expects to derive advantage from an act, which is done by another for him, must answer for any injury which a third person may sustain from it.⁴ That where either party to a transaction made with an agent is to suffer by his neglect, it should be his principal.⁵ Hence a master is liable for the act of his servant, done in the course of his employment about his master's business.⁶ But not for the act of his free servant done outside of his employment.⁷ The test of the principal's liability for the tortious acts of his agent is, was he or not, at the time when the act complained of was done, in the course of the master's service.⁸ Thus the owner

¹ *Wheatley v. Patrick*, 2 M. & W. 650.

² *Steele v. Smith*, 3 E. D. Smith, 321. 529.

³ *Rich v. Jakway*, 18 Barb. 357.

⁴ *Per Best, C. J., Hall v. Smith*, 2 Bing.

⁵ *Nicoll v. American, &c.*, 3 W. & M.

⁶ *Priester v. Augley*, 5 Rich. 44.

⁷ *McClenaghan v. Brock*, 5 Rich. 17.

⁸ *Echols v. Dodd*, 20 Tex. 190.

of a lot of land, occupied by his servant, directed him to *summer-fallow* a part of it, and, in order to prepare the land for the plough, the servant cut down and placed in piles, on one side, the brush growing upon the premises, and then, at a time of unprecedented drought, when the act was negligent in itself, directed his son, a lad, to set fire to the brush-heaps, which he did, and thereby fire was communicated to the plaintiff's woods. Held, the removal of the brush was within the scope of the servant's employment, the act of firing was the act of the servant, and the master was liable.¹ (a) But though, if the servant be in the performance of, and intrusted with, the ordinary business of his master, the master is chargeable in trover for a wrongful conversion by the servant; the mere fact that he was the servant of the defendant is not sufficient to charge him.²

§ 5 a. In case of the master's liability, the act is treated as virtually that of the master himself, and may be so alleged. Thus, in an action for negligently driving a cart against the plaintiff's carriage, it may be stated in the declaration as the act of the master, though in fact it be the act of the servant.³ Upon the same principle, where the declaration states, that, whilst the plaintiff was crossing a certain street, the defendants, by their servant, negligently drove and injured the plaintiff; the defendants, under not guilty, may show that the driver was not acting as their servant.⁴ But where an action cannot be maintained against a party, unless there has been *personal negligence* on his part, it is

¹ *Simons v. Monier*, 29 Barb. 419.

² *Arthur v. Balch*, 3 Fost. 157.

³ *Brucker v. Fromont*, 6 T. R. 659.

⁴ *Mitchell v. Crassweller*, 16 Eng. L. & Eq. 448.

(a) The following case is reported in a newspaper:—

Supreme Court, New York. *Carman et al. v. The Mayor, &c.*—Action for negligence on the part of agents. The complaint alleges, that the plaintiffs are the owners of certain lands adjoining the Croton Aqueduct lands, belonging to the corporation; that on their land were seven large fruit-trees, in a parallel, or nearly parallel line, of the Croton Aqueduct land, which, also, were similar fruit-trees; that on the defendants instructed certain laborers to cut down and clear the Croton Aqueduct lands of all such trees thereon; and that, in consequence of the carelessness of such laborers, and the negligence of the corporation in not having persons familiar with the boundary lines between the lands, to superintend the work, the plaintiff's

trees were also cut down and removed. On demurrer, held, the city was liable. The servants committed the act in the course of their employment, ignorantly, under the supposition that they were on the land of the defendants. A proper precaution on the part of the defendants would have prevented the injury. It was plainly the duty of the defendants to have given such instructions to their laborers, as would have enabled them to discriminate between the property or trees of the city and those of the plaintiffs. Had the defendants supposed the trees to be their own, and directed them to be cut down, they would certainly be liable. It is not less an act of culpable negligence, that they failed to give such directions as would have caused the injury to be avoided.

not enough to show that he has ordered work to be done, not necessarily amounting to a nuisance, nor causing injury, but in the course of which an injury is accidentally inflicted, although he did not give any special direction to adopt a particular precaution which might have prevented it; for it must be taken that he gave general directions to do the work in a proper manner, and to adopt all proper precautions; and the neglect of any such precaution, even assuming it to be negligence, which might, under ordinary circumstances, render the employer legally liable, is not his *personal* negligence; so that he would be liable for an injury sustained in such a case by one of his own workmen, or in a case in which a statutable defence was raised, on the ground that there was no negligence on the part of the defendant "otherwise than by his servants or workmen."¹ And the rule *respondeat superior* does not apply to a mere *statutory* liability. Thus a master is not liable, under the Massachusetts Rev. Stats. c. 51, § 3, for the damages sustained by any party, by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the travelled part of a road, when meeting another vehicle.² (See p. 418, n.)

§ 6. It is not necessary that there should be any express assent or agreement on the part of the master, in the particular transaction brought in question, in order to charge him for the act of the servant. Thus "for the acts of a man's own domestic servants there is no doubt but the law makes him responsible."³ (a) And "where an agent or servant, without any prior authority, performs a needful act, which it was for the manifest benefit of his principal or master should be performed, the assent and authority of such principal or master to the performance of the act will be implied."⁴ So where the plaintiff, *according to the common course of dealing*, delivers to the defendant's servant an ingot of gold to assay; if it is not returned, he may bring trover against the master, after a demand and refusal.⁵ So where a person occasionally employed by the defendant as his servant, being sent out by him on his business, takes the horse of another person, in whose service he

¹ *Scott v. Mayor, &c.*, 28 Eng. L. & Eq. 477.

² *Goodhue v. Dix*, 2 Gray, 181.

³ *Per Littleale, J.*, *Laugher v. Pointer*, 5 B. & C. 547.

⁴ *Per Duer, C. J.*, *Purvis v. Coleman*, 1 Bosw. 327.

⁵ *Mead v. Hamond*, 1 Stra. 505.

(a) The sale of a horse by a groom is an absolute nullity; and the owner can recover back his property, or the value, with damages, from the purchaser. *Russell v. Runnemann*, 19 La. Ann. 517.

also worked, and, in going, rides over the plaintiff; it is a question for the jury, whether the horse was taken by the servant with the implied consent or authority of the defendant; in which case the defendant is liable.¹ And, with regard to the frequent case of *deviation* from the servant's regular employment, it is said: "No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance."² Thus A, the general manager of the defendant, a horse-dealer, had a horse and gig, which he used both for his own and the defendant's business, and which was therefore kept at the defendant's expense. On putting the horse into the gig, A told the defendant he was going to a certain place to collect a debt for him, and afterwards to see his own physician. Before reaching the place, he killed the horse of the plaintiff by running the gig against him. Held, the defendant was liable.³ So the defendant sent his son for cattle in a pasture of the defendant, supposing them to be there, but the son, not finding them there, searched for them in a neighboring field of the plaintiff, and drove off two heifers, which the plaintiff alleged to be his. Held, the son was doing the business for which he was sent, and the father was liable.⁴ So it is held that a master is liable, although the servant acted in direct violation of his orders, if in the course of his employment as a servant. As where an injury occurred in consequence of leaving a truck in the street, which the servant was ordered to place upon a lot provided for that purpose; the servant being rightfully in possession of the truck and about his master's business. So if the servant should carelessly drive against a carriage, although ordered to drive carefully and avoid coming in contact with any carriage.⁵ So the master is liable for an act done in *misunderstanding* of his orders. Thus where a principal directed his agent to get a team of horses, intending that

¹ Goodman v. Kennell, 1 Moo. & P. 241.

² Per Jervis, C. J., Mitchell v. Crassweller, 13 Com. B. 237.

³ Patten v. Rea, 40 Eng. L. & Eq. 329.

⁴ Andrus v. Howard, 36 Vt. 248.

⁵ Per Fletcher, J., Powell v. Deveney,

3 Cush. 304, 305; Philadelphia, &c. v. Derby, 14 How. 468; Southwick v. Estes, 7 Cush. 385.

he should first obtain the owner's permission, which he, through a misunderstanding, failed to do, but took them without leave, and in using them killed one, it was held that the principal was liable for the value of the horse.¹ (a) So a master is equally liable, where proper instructions have not been given to the servant, or such instructions have been disregarded. Thus the defendant was the owner of boards, which were piled in the mill-yard of a saw-mill, near to a pile of boards belonging to the plaintiff, and sent a man in his employment to draw away his boards, and directed him to call upon the sawyer to inform him which were the defendant's boards. The person sent, having obtained information of the sawyer, and supposing he was obtaining the defendant's boards, drew away the boards of the plaintiff with those of the defendant. Held, the defendant having sent his hired man to follow such instructions as he might obtain from the sawyer, and he having received such instructions as induced him to take away the plaintiff's boards, it was the same as if the defendant had given the instructions himself; and the defendant was liable in trespass for taking the boards, whether the fault was in the sawyer, in not giving sufficiently specific instructions, or in the hired man, in not properly apprehending or following them.² So a master may be liable in trespass for any act done by his servant, even in the course of executing his orders with ordinary care; as where a master ordered a servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall.³ So where the defendant's slaves took timber and sawed it, without or against his orders, or by mistake: yet, if the lumber when sawed came to the defendant's use, either by being sold or otherwise appropriated to his benefit, however innocently on his part; this was a conversion, and rendered the master liable in trover.⁴

§ 6 a. The master is held liable for an injury *remotely* arising from the servant's negligence. Thus the defendant's servant, while

¹ Moir v. Hopkins, 16 Ill. 313.

² May v. Bliss, 22 Vt. 477.

³ Gregory v. Piper, 9 B. & C. 591; 4 Man. & Ry. 500.

⁴ Lee v. McKay, 3 Ired. 29.

(a) But, in an action brought under the Illinois "act to prevent trespassing by cutting timber," it is necessary to show that the act has been wilfully violated, by proof that the defendant, in his own person, cut the trees, or induced another person to do

so, by his command or authority. It is not sufficient to show, that the trees were cut by persons employed by him to cut timber on his own land, and appropriated by them. Cushing v. Dill, 2 Scam. 460. See p. 428.

negligently driving his sleigh, came into collision with another sleigh, causing the horse attached to the latter to take fright and run away, and injuring the plaintiff in his flight. Held, the defendant was liable.¹

§ 6 *b*. But, though a master is responsible for an injury resulting from the negligence of his servant whilst driving his cart or carriage, if the servant is at the time engaged in his master's business, even though the accident happens in a place to which such business did not call him; it is otherwise, if the journey upon which the servant starts be solely for his own purposes, and undertaken without the knowledge or consent of his master. The question is, was he driving on the business, and with the authority, of the master.² Thus if a servant, in using the team of the master, with his assent, but for his own purposes and benefit, the master not being present nor giving any directions, by his negligence injures a third party; the master is not responsible.³ So the defendants' carman, having finished the business of the day, returned to their shop in Welbeck Street, with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman to Euston Square, and, on his way back, ran over and injured the plaintiff and his wife. Held, inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorized act.⁴ (*a*) The same rule was applied, where a servant is ordered to drive cattle from a field, and drives them elsewhere than out of the field.⁵ So it has been held, that, if one employs another to do an act which may be done *in a lawful manner*, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer

¹ McDonald v. Snelling, 14 Allen, 290.
See Campbell v. Providence, 9 R. I. 262.

² Patten v. Rea, 40 Eng. L. & Eq. 329;
13 Com. B. 182.

³ Bard v. Yohn, 25 Penn. 482.

⁴ Mitchell v. Crassweller, 13 Com. B.
237; 16 Eng. L. & Eq. 448.

⁵ Oxford v. Peter, 28 Ill. 434.

(*a*) The declaration alleged, that "the defendants were possessed of a certain cart and horse, which was being driven by and under the care and direction of their servant" not saying, "at the time of the grievance complained of;" and that, "whilst the plaintiff was crossing a certain street, &c., the defendants, by their servant, so negligently and improperly drove and

directed the said cart and horse along the said street, that the plaintiff was knocked down and injured." Held, that the first allegation was immaterial, and not traversable; and that, under "not guilty," the defendants might show that the driver was not at the time of the accident acting as their servant. 13 Com. B. 237.

is not responsible. Thus the defendant employed A to construct a drain in a highway; A employed B to fill in the earth over the brick-work, and to carry away the surplus; and B, in performing his work, left the earth raised so much above the level of the road, that the plaintiff, driving by in the dark, was thereby upset, and sustained injury. Held, that the defendant was not responsible.¹ So it is held, that, where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.² (See § 11.) And, upon the general principle *in pari delicto*, &c. (see chap. 4), it has been held that a master will not be liable for the act of a servant employed on the express recommendation of the plaintiff. Thus if an officer, having attached goods on mesne process, delivers them for safe-keeping to a bailee appointed by him on the nomination of the plaintiff, he is not responsible for the fidelity of the bailee.³ But it is not necessary, in order to render the master liable, that the loss or injury should have occurred solely through the neglect of the servant. Thus a colt strayed from a field on to a public road, abutting upon which was a yard, not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train. Held, that the company were responsible.⁴

§ 7. It has already appeared, that, to constitute one the servant of another, with reference to a liability for the wrongs of the former, it is not necessary that the former should be in his regular, standing employ. It is sufficient that he is employed for the particular work in connection with which the injury is done; and very many of the reported cases are of this description. Thus the defendant employed A to clean out a drain on his land. A was not in the defendant's service, but was a common laborer, selected by the defendant, on account of his having dug the drain originally. A cleaned out the drain alone, and without further direction or inspection of the defendant, and received five shillings for the job. In the course of cleaning out the drain, A took up part of an

¹ Peachey v. Rowland, 13 Com. B. 182.

² Steel v. Southeastern, &c., 16 Com. B. 550; 32 Eng. L. & Eq. 366.

³ Donham v. Wild, 19 Pick. 520.

⁴ Midland, &c. v. Daykin, 33 Eng. L. & Eq. 193.

adjoining highway, and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured. Held, A was not an independent contractor, but was acting as the servant and under the control of the defendant, and that the defendant was responsible to the plaintiff for the injury.¹ And a corporation is liable in tort for the tortious act of its agent, if done in their ordinary service, though the appointment of the agent be not under seal.²

§ 7 *a*. If one temporarily hires the servant of another, the latter is responsible, as the general master, for an injury resulting from the negligence of the servant. Thus where A, the owner of a carriage, hired four post-horses and two postilions of the defendant, a livery-stable keeper, for the day, to take him from London to Epsom and back; and, in returning, the postilions damaged the carriage of the plaintiff: the defendant, as owner of the horses and master of the postilions, was liable to the plaintiff for such damage.³

§ 7 *b*. But a person will not be held responsible as a *master*, merely on the ground that he commenced certain work, which was afterwards pursued by others, in consequence of whose negligence an injury was caused. Thus, where a person is employed to do any work in a highway, street, or common staircase, and for the convenience of his operations makes an opening there, or places any thing there which may be dangerous if left unsecured, and then goes away for a time, leaving his work unfinished, with the intention of returning to finish it at a future period, and in the mean time other workmen are using the opening, &c., for their operations: it is the duty of the latter to secure the opening, &c., at night; and, if they do not, they, and not the person who originally made the opening, are liable in damages for any accident which may happen from their neglect.⁴

§ 8. As in the class of injuries heretofore considered, which fall more properly under the head of *trespasses*, so also in cases of mere *negligence*, the personal presence of the master has been sometimes held an important consideration in reference to his liability. Thus the defendant, an engineer, being employed by A to erect a steam-boiler and other apparatus on premises adjoining

¹ *Sadler v. Henlock*, 4 Ell. & Bl. 570.

² *New York, &c. v. Dryburg*, 35 Penn.

³ *Smith v. Lawrence*, 2 Man. & Ry. 1.

⁴ *Milne v. Smith*, 2 Dow, 390.

to the manufactory of the plaintiff, and, in consequence of the explosion of the boiler from the insufficiency of the materials, the property of the latter being injured; and it being found by the jury *that the defendant was personally present*, and that his servants had the management of the apparatus at the time of the accident: held, the plaintiff might maintain case against the defendant.¹ (a)

§ 9. The liability of a master may depend somewhat upon the question, whether he receives the benefit of the *consideration* paid in connection with the act which causes the injury. Thus it has been held that the master of a stage-coach is not chargeable for goods lost by the driver, unless the master takes a price for the carriage of goods, although money be given to the driver as a gratuity.² Upon similar ground, where the plaintiff was in the store of the defendant *as a customer*, and a clerk invited her to walk into a dark part of the store, in which there was an open trap-door, through which she, without negligence on her part, fell and broke her arm; it was held, that the defendant was liable.³ And the same consideration may determine, whether the relation of master and servant actually exists in relation to the transaction in question. Thus the defendants, a gas-light company, had employed A to let on gas into houses, but such employment had ceased. They, however, at the request of consumers, allowed him to continue doing so. Through the omission of A to close the end of a pipe in a room before letting on the gas, it exploded. The plaintiff, the party injured thereby, had notice of the facts above stated. Held, the defendants were not liable.⁴ So a railroad was mortgaged to the defendants in trust for the benefit of bondholders. The trustees took possession, and leased the road, but, under a verbal agreement, continued to operate it for the lessees, and receive the earnings, pay the expenses, select, contract with, and discharge the employees, and exercise all the ordinary powers of railroad corporations. Held, the defendants were liable for an injury caused by the negligence of such employees.⁵ So, on the other hand, an employer made a bargain with his employee, to cut all the logs the employer had on certain land, and to deliver them

¹ Witte v. Hague, 2 D. & Ry. 33.

² Middleton v. Fowler, 1 Salk. 282.

³ Freer v. Cameron, 4 Rich. 228.

⁴ Flint v. Gloucester, &c., 9 Allen, 552.

⁵ Ballou v. Farnum, 9 Allen, 47.

(a) The master of a canal boat is liable for injury caused to a bridge by negligence of the crew, of whom he was in immediate

command, though he was at the time not on board, but on the tow-path. Korah v. Ottawa, 32 Ill. 122.

to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, nor to render any assistance, pecuniary or otherwise, in the cutting or running of the logs. Held, the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others by his conduct in performing his contract.¹

§ 10. A master is liable for the negligence of servants employed by his own servant. (a) Thus, in reference to a coachman, it is said: "He is hired by the master, either personally or by those who are intrusted by the master with the hiring of servants."² So, "If a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff, or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him. So, in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer."³ And the same rule applies, although both servants are themselves masters, and one is employed by the other only for the particular service in which the injury occurs. Thus the defendants, occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them

¹ *Moore v. Sanborne*, 2 Mich. 519.

³ *Laugher v. Pointer*, 5 B. & C. 554.

² Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 547. See 29 Barb. 419.

(a) In reference to real estate, the rule has been still farther extended. It is held, that the owner of land is bound to see to it that his affairs thereon are so carried on as not to injure others, unless the injury be committed by a *trespasser*, whom he has been unable to exclude by means of due

care. Thus an owner gave general directions to A, his servant, to throw the snow and ice from his roof; and B, a friend of A, voluntarily assisted him. Held, the owner was liable for an injury caused by snow and ice thrown down by either. *Althorff v. Wolfe*, 22 N. Y. (8 Smith) 355.

attended with their men. During the process of lowering, the barrel fell, and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held to be liable.¹ (a) But, it is said, the master's liability does not extend to the negligent acts of his servants' agent or servant, unless the servant of such master has directed the particular act, or is so connected with it as to make the negligence his own, in fact as well as in law.² Thus an express company are not liable for a package of money delivered to the clerk of their agent, outside of the agent's office, and lost in the hands of the clerk; although former agents were accustomed to receive such packages from the plaintiff, and the clerk to receive them in the office.³

§ 11. But while a *master* is responsible for injuries arising from the negligence of his *servant* or those employed by such servant; it is the prevailing doctrine, that a party who has *contracted* for the doing of certain work, for his use and benefit, is not liable for injuries arising in the performance of such work.⁴ (b) The distinction is predicated upon the ground that a master *has the control*

¹ Randelson v. Murray, 3 Nev. & Per. 239.

² Simons v. Monier, 29 Barb. 419.

³ Cronkhite v. Wells, 32 N. Y. (5 Tiffa.)

247. See Barrett v. Singer, 1 Sweeny, 545.

⁴ Cincinnati v. Stone, 5 Ohio, N. S. 38; Forsyth v. Hooper, 11 Allen, 419.

(a) Bales of cotton were insecurely piled in a warehouse, by cotton porters acting under the control of the warehouse keeper, but in the employ of the defendant, a cotton merchant, to whom the bales belonged. A few days after, the plaintiff, being lawfully in the warehouse to recan-vas the bales of another cotton merchant, was injured by the fall of one of the defendant's bales. Held, the defendant was not responsible. *Murphey v. Caralli*, 3 Hurl. & Colt. 462. See *Haack v. Fearing*, 5 Rob. 528.

(b) It is to be observed, that the relation of master and servant sometimes depends rather upon the actual connection of the parties in a particular transaction, than upon any contract between them. Thus where A bought a heavy article of B, at his store, and sent a porter to get it, and the porter by permission of A, using his tackle and fall, through negligence, suffered the article to fall, by which C was injured; it was held, that the porter acted as the servant of B, and that A was not answerable. *Stevens v. Armstrong*, 2 Seld. 435.

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent

driving an injury was done to a horse belonging to the plaintiff; the court were divided in opinion as to the liability of the owner of the carriage. *Laugher v. Pointer*, 5 B. & C. 547.

A hired a team, wagon, and teamster, of the defendant; which, while used in A's business, and by reason of a defect in the harness, ran against and killed the horse of the plaintiff. Held, the defendant was liable, the teamster being his servant and not A's. *Crockett v. Calvert*, 8 Ind. 127.

By arrangement between the defendant, the registered proprietor, and the licensed driver, of a hackney cab, the driver paid 4s. 6d., each morning, for the uncontrolled use of the cab and two horses during the day, and the fares earned each day belonged to the driver. The horses were fed at the expense of the defendant, and his name appeared upon a plate on the cab. Held, the driver was the servant or agent of the defendant, with authority to enter into contracts for the employment of the cab, and the defendant therefore liable for a loss occasioned by the breach of a contract by the driver safely and securely to carry. *Powles v. Hider*, 36 Eng. L. & Eq. 162.

of his servant, and can remove him for misconduct ;¹ while a contractor, as between him and his employer, is responsible only *for the fulfilment of his agreement*, and, pending the performance of the work, is to a certain extent substituted for the party for whom the work is to be performed. Upon the questions, however, whether in any particular case the one or the other of these two relations subsists, whether the distinction above referred to is well founded, and, if so, how far it is modified by peculiar circumstances ; many and somewhat conflicting decisions are to be found in the books. The general proposition is laid down, that, if an employer *keeps control of the mode of work*, there is no distinction between his liability for a contractor and for a servant.² (a) And, in a very late case, that a party is liable, if the act which causes the injury is one which he employed another to do, or if it is one which it was incumbent on him to perform as a duty, and which he intrusted to another to do in his stead.³

§ 12. In an early and leading case, which, however, has been often questioned, and seems now by the weight of authority overruled ; the defendant, having a house by the road-side, contracted with A to repair it for a stipulated sum ; A contracted with B to do the work, and B with C to furnish the materials. The servant of C brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that the defendant was answerable.⁴ So the defendant, a warehouseman, at Liverpool, employed a master porter to remove a barrel from his warehouse. The latter employed his own men and tackle ; and, through the negligence of the men, the tackle failed, and the barrel fell, and injured the plaintiff. Held, the defendant was liable.⁵ So an employer is held answerable for the misfeasance of one, who, on account of *peculiar skill*, is employed by the day to

¹ Quarman v. Burnett, 6 M. & W. 499. But see Reedie v. London, &c., 4 Exch. 244.

² Cincinnati v. Stone, 5 Ohio, N. S. 38.

³ Pickard v. Smith, 4 Law Times, 470 ;

⁴ Allen, 140. See 12 a.

⁴ Bush v. Steinman, 1 Bos. & Pull. 404. See Pickens v. Diecker, 21 Ohio St. 212.

⁵ Randleson v. Murray, 8 Ad. & Ell. 109.

(a) An action lies against the owner of a horse, which causes an injury, driven by one engaged in the owner's business, though in the general employment of A, unless A's relation to the business gave him exclusive control of the means and manner of its accomplishment, and exclusive direction of the employees. Kimball v. Cushman, 103 Mass. 194.

Although a building is erected by contractors, under an agreement that they shall have the sole right to control the work ; the owner, by giving directions as to the work, becomes liable for injuries to A through negligence of the contractors in executing the owner's orders. Hefferman v. Benkard, 1 Rob. 432.

oversee certain work, and who takes the entire charge of it.¹ So the defendants, contracting with pipe-layers to lay down water-pipes in a city, were held liable for the negligence of workmen employed by the pipe-layers.² So a municipal corporation, employing workmen to lay down gas-pipes in the borough, is responsible for their negligence.³ So a railroad corporation made a contract for the building of a certain portion of the railroad. While the contractors were at work upon the road, rocks were blasted, and a stone was thrown upon the plaintiff, causing him injury. Held, the plaintiff might maintain an action against the corporation.⁴ So the plaintiff was injured, by being thrown from his wagon by a collision with a car owned by one railroad, but drawn by horses owned by another railroad, and driven by a man employed by the latter. Held, the latter railroad was liable.⁵ So A, the lessee of a ferry, hired from the defendants, for one day, a steam-tug and crew, to assist in carrying passengers. He received the fares, and the defendants were paid by him for the hire of the tug; they sent and paid the crew. The plaintiff, who had contracted with and paid A for being carried across at all times during one year, went on board the tug from A's pier. By the negligence of the crew, some tackle broke; and the plaintiff, while on board, was injured. Held, he was entitled to recover.⁶ So, in Maine, a railroad is liable for loss by fire communicated from a locomotive (under St. 1842, c. 9, § 5), though the road is leased to another company, who at the time have the control and management of it, and who own the engine.⁷ So the owners of a floating dock leased it to the owners of a vessel, who employed a shipwright to repair the vessel. Through an imperfection in the dock, an employee of the shipwright was injured. Held, the owners of the dock were liable.⁸

§ 12 *a*. And the cases which negative the liability in question turn upon the same distinction. (See § 11.) Thus, where C had contracted with a town to widen a highway, by removing the rocks from a ledge therein, for a certain sum of money and the stone, and afterwards contracted with A to build a dam for him with the

¹ Morgan v. Bowman, 22 Mis. 538.

² Matthews v. West London, &c., 3 Camp. 403.

³ Scott v. The Mayor, &c., 37 Eng. L. & Eq. 495.

⁴ Stone v. Cheshire Railroad, 19 N. H. 427.

⁵ Weyant v. New York, &c., 3 Duer,

360.

⁶ Dalyell v. Tyrer, 1 Ell. Bl. & Ell.

899.

⁷ Stearns v. Atlantic, &c., 46 Me. 95.

⁸ Cook v. New York, &c., 1 Hilt. 436.

stone, for which he was to receive a certain price per day while at work upon the dam and in blasting the rocks, — A furnishing the powder for the blasting, and superintending the building of the dam, but having no control of the blasting, — and, in blasting, a rock was thrown upon the building of S., causing an injury for which C was subjected in damages; held, the relation of master and servant did not exist between A and C, and A was not liable to indemnify C for such damages.¹ So the defendant A, one railroad company, by a verbal arrangement with B, another, gave to the latter the right to construct a track on the side of A's road-bed, for the purpose of connecting the two roads; which track passed over a bridge previously constructed by A for its track, and which foot-passengers had been permitted to use. The plaintiff, in passing on foot over the bridge, at night, fell through, between the rails of the connecting track, by reason of its imperfect covering, and was injured. Held, if the nuisance complained of was created solely by B in the construction of the connecting track, and B had the sole ownership, possession, and use of such track, the contract giving A no power of control in the construction or use thereof; A was not liable, though having a reversionary interest in the premises, subject to the easement of B.² So A and B had an absolute contract with a railroad, to draw its cars over a certain portion of the road, to furnish the horses and drivers, and to assume the entire control of the work. Held, while A and B were in the performance of this contract, the railroad could not be made liable for the negligent acts of their employees.³

§ 13. A numerous class of cases upon this subject are those affecting the liability of *owners of real property*, for injuries done in the performance of work upon such property. (a) Thus the defendant, the owner and occupier of premises adjoining the highway, employed A to make a drain therefrom to the common sewer. The workmen employed by A placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained personal injury. Before the accident, the dangerous posi-

¹ Corbin v. American, &c., 27 Conn. 274.

² Gwathney v. Little, &c., 12 Ohio, N. S. 92.

³ Schular v. Hudson, &c., 38 Barb. 658.

(a) Such was the leading case of Bush v. Steinman; and there, as in other cases, the general principle was applied, that the owner of the soil is responsible for its proper use, and liable to damages for

any nuisance existing thereupon. It will be seen, however, that this has not been generally regarded as a decisive test of liability.

tion of the heap was pointed out to the defendant, who promised to remove it. A had the sole management of the work, and employed and paid B to cart away part of the rubbish at a certain price per load, and had charged the defendant in his bill with the sum so paid. Held, the defendant was liable to the plaintiff.¹ So the defendant, with the consent of the owner of the soil and the surveyor of the district, employed P., a laborer, particularly skilled in the construction of drains, but never before employed by the defendant, to cleanse a drain which ran from the defendant's garden under the public road, and paid P. five shillings for the job. The defendant did not in any way interfere with or direct P. in doing the job. Held, the defendant was liable for an injury occasioned to the plaintiff, whilst riding on the public road, by reason of the negligent manner in which P. had left the soil of the road over the drain.² (a) So if A contract with B, to do the carpenter work of a building at a fixed price, and to superintend the other work on the building, employing hands and certifying their bills to B, who pays them, and A is guilty of negligence, in not sufficiently guarding a pit or vault opened in the sidewalk of the premises on which the building is erected; B will be responsible for damage sustained by a person falling into the opening in consequence of such negligence. Had the negligence been that of the carpenters working under A, the rule of responsibility might have been different.³ So where a person employs a mechanic to make a drain for him, on his own lands, and extending thence to a public drain, the mechanic procuring the necessary materials, hiring laborers, and charging a compensation for his services and disbursements, the mechanic is deemed to be in the service of his employer, to the effect of rendering his employer responsible to a third person, who sustains damage by reason of want of skill or want of due diligence and care on the part of the mechanic.⁴ So A left his cart, filled with wood, by the side of the fence, within the highway, before his homestead, in the evening; and the next morning the cart was found in the travelled path, about five rods

¹ *Burgess v. Gray*, 1 Com. B. 518; 14 Law Jour. 184, N. S.

² *Sadler v. Henlock*, 30 Eng. L. & Eq. 167.

³ *Samyn v. McClosky*, 2 Ohio, N. S. 536.

⁴ *Stone v. Codman*, 15 Pick. 297.

(a) Where the purchaser of land permits a third person, in possession at the time of the purchase, to retain exclusive possession, no rent being paid or claimed, the purchaser will not be liable for his

building a dam upon the land, without the knowledge of the purchaser, whereby injury is occasioned to the premises of an adjacent land-owner. *Pettibone v. Burton*, 20 Vt. 302.

distant from the place where it was left, upset, lying on one side, and the wood by it, constituting together a dangerous obstruction, in the road. By whom or by what agency this was done, did not appear; but A, knowing the situation of his property, and having a reasonable opportunity to remove it, suffered it to remain there two or three days, when B, travelling along the highway in the night, in a one-horse wagon, drove accidentally upon the cart and wood, without previously discovering them, by reason of which he was violently thrown from his wagon, and severely and dangerously injured. In an action on the case, brought by B against A, to recover damages for this injury, it was held, 1st, that the property in question, notwithstanding its removal, continued to be legally in the possession and under the control of A; 2d, that A, having knowingly and willingly permitted his property to remain where it was so placed, was liable to B for the injury he sustained thereby; 3d, that, if the obstruction was effected by a trespasser who was unknown to A, this circumstance would not change or modify A's duties and responsibilities in the case.¹ So A hired B to move a house across a street to a lot of A's. B, in moving the house, dug a hole near the middle of the street, for fixing an anchor, by which the house could be turned. C's horse fell into the hole, which B had neglected to fill up, and was injured. Held, that A was liable for the injury.² So in an action on the case for an injury to real estate, caused by the undermining of a hill on the defendant's premises, by which a *slide* occurred, covering the plaintiff's land; it is held not necessary for the plaintiff to show actual negligence on the part of the defendant himself. It is enough to show that the defendant permitted another person to remove the earth from his premises, and that this was done in a negligent manner.³ So the defendant, lessee of a building, employed A, a carpenter, to repair an awning which extended from the building over a street; but there was no express provision as to terms, price, or time. By means of A's carelessness in doing the work, the plaintiff, lawfully passing in the road, sustained an injury by the falling of a rod. Held, the defendant was liable.⁴ So where a city undertakes repairs upon a highway, and the work is let out to contractors, they will be liable for accidents such as are incident to, and consequent upon, the work itself, but not for

¹ *Linsley v. Bushnell*, 15 Conn. 225.

² *Wiswall v. Brinson*, 10 Ired. 554.

³ *Gardner v. Heartt*, 2 Barb. 165. Reversed, 1 Comst. 528.

⁴ *Brackett v. Lubke*, 4 Allen, 138.

those which result from an improper execution of it ; liability for which may be limited by the terms of the contract. It seems, that, where the injury arises from the nature of the work, and not from a failure to execute it carefully ; the employer of the contractor must be liable. And where the charter provided, that the commissioners should have power to contract for grading, &c., “ and to direct and control the persons employed therein ; ” and a contract provided, that the work should be under their direction : held, the contractor’s employees were the servants of the city.¹ So, on the other hand, where A, having obtained permission from a municipal corporation to lay gas-pipes in a street, makes a contract with B to do the work ; it is A’s duty to restore the street to a condition of safety ; and he is liable for injury caused by the negligence of B’s servants.²

§ 14. But on the other hand it is held, as has been already suggested (§ 11), that, while “ every man is answerable for acts done by the negligence of those whom the law denominates *his* servants ; because such servants represent the master himself, and their acts stand upon the same footing as his own ; ”³ “ the *sub-contractor*, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants, in the execution of the work contracted for.”⁴ It is said : “ The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed ; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.”⁵ So, in very late cases, it is remarked : “ the defendants had no control over the men employed by the contractors, or over the contractors themselves. They could not dismiss them or direct their work. (a)

¹ St. Paul v. Seitz, 3 Minn. 297.

² McCamus v. Citizens, &c., 40 Barb. 380.

³ Per Littledale, J., Laughner v. Pointer, 5 B. & C. 547.

⁴ Per Maule, J., Overton v. Freeman, 11 Com. B. 867. See Allen v. Hayward, 7 Ad. & Ell. N. S. 960.

⁵ Per Rolfe, B., Hobbit v. London, &c., 4 Exch. 255.

(a) In a late case, even this test is held not conclusive of the employer’s liability.

To constitute the relation of master and servant between an employer and an em-

There cannot be more than one superior legally responsible.”¹ “If a person in the exercise of his rights employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable.”² Numerous cases in addition to those already cited (§ 12 *a*) illustrate this principle. Thus it is often held, that *municipal corporations* are not liable for the acts or negligence of their contractors, unless the relation of master and servant exists between them.³ (See chap. 38.) So trustees or commissioners, intrusted with the conduct of public works, are not liable for injuries occasioned by the negligence of the workmen employed under their authority.⁴ As where the corporation of the city of New York, having ordered a street to be graded, contracted with A to do the grading, the whole work to be done under the direction and to the entire satisfaction of the commissioner, &c. And it was held, that the city was not liable for damages caused by the workmen employed by A.⁵ So A contracted with B to erect a tubular bridge. B had a surveyor, C, whom he paid a salary of £250 a year to attend to his general business; and, after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive £40 irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and, owing to the want of sufficient light to warn the passers-by, D stumbled over the pole and was injured; subsequent to which, additional lights were placed on the spot, and B paid for them. Held, that B was not liable, and that D’s remedy was against C.⁶ And, in general, contractors for public improvements are not liable for workmen employed by sub-contractors.⁷ So a railroad company is not liable for the negligence of a contrac-

¹ Per Strong, J., *Painter v. Pittsburgh*, Law Reg., April, 1864, p. 354, Pennsylvania.

² Per Cockburn, C. J., *Gray v. Hubble*, 32 Law Jour. Rep. pt. 8, N. S.

³ *Barry v. St. Louis*, 17 Mis. 121.

⁴ *Harris v. Baker*, 4 M. & S. 27; *Hall v. Smith*, 2 Bing. 156.

⁵ *Kelly v. New York*, 1 Kern. 432.

⁶ *Knight v. Fox*, 1 Eng. L. & Eq. 477.

⁷ *Gourdier v. Cormack*, 2 E. D. Smith, 254.

ployee, so as to render the former liable to indemnify the latter, for damages to which he has been subjected on account of injuries committed by him while using ordinary care in the employer’s business; the employee must be acting at the time strictly in the place of the employer, in accordance with and representing the employer’s will and not his own, and the

business must be strictly that of the employer, and not in any respect the employee’s. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the existence of the relation of master and servant. *Corbin v. American Mills*, 27 Conn. 274.

tor's servants.¹ So, if the owner of goods, in shipping them, has no control over the process, which is entirely in the hands of the master of the vessel; an action for an injury, sustained by one employed by the owner to assist in shipping his goods, by reason of a defect in the tackle, unknown to the injured man, and which by the use of ordinary care might have been cured, should be brought against the master alone; though it would be otherwise when the duty lies wholly upon the owner, or is jointly divided between him and the master.² So the defendant, a builder, employed by the committee of a club, to make certain alterations at the club-house, employed A, a gasfitter, by sub-contract, to do that part of the work. By the negligence of A, in the course of the work, the gas exploded, and injured the plaintiff. Held, the defendant was not liable.³ So the defendants were permitted to construct a public sewer at their own expense, and employed one A to do the whole work at a stipulated price. The plaintiffs received an injury from the negligent manner in which the sewer was left at night. Held, the defendants were not liable.⁴ So a public, licensed drayman was employed by the defendant to haul salt from a warehouse, and deliver it at the defendant's store, for so much a barrel. While in the act of delivering it, a barrel, through the drayman's carelessness, rolled against and injured the plaintiff, being on the sidewalk. Held, the defendant was not liable.⁵ So, upon a declaration, that the defendant was licensed to run a skiff ferry across a river, and did run it by his lessee; and that the plaintiff's intestate was taken on board, and by the negligence and want of skill of the rower, was drowned: held, whether the rower was the lessee or one in his employ, and though the lease was a breach of the defendant's duty to the government, he was not liable.⁶ So A contracted with parish officers to pave a certain district, and entered into a sub-contract with B, under which the latter was to lay down the paving of a street, the materials being supplied by A, and brought to the spot in his carts. Preparatory to the paving, the stones were laid, by laborers employed by B, on the pathway, and there left unguarded at night, in such a manner as to obstruct it, and C fell over them, and broke his leg. Held, that B was responsible for this negligence, and not A.⁷

¹ *Clark v. Vermont, &c.*, 2 Wms. 103;
Pawlet v. Rutland, &c., *ib.* 297.

² *McGatrick v. Wason*, 4 Ohio, 566.

³ *Rapson v. Cubitt*, 9 M. & W. 710.

⁴ *Blake v. Ferris*, 1 Seld. 48.

⁵ *De Forrest v. Wright*, 2 Mich. 368.

⁶ *Blackwell v. Wiswall*, 24 Barb. 355.

⁷ *Overton v. Freeman*, 11 Com. B. 867.

§ 14 *a*. And although the tendency of former decisions has been to establish a distinction, by which the owner of *real estate* is in all cases held liable for injuries done in the prosecution of work thereupon; a doubt has been suggested, whether this distinction can be relied on.¹ And in a late case the distinction has been said not to exist, except in case of nuisance.² It is held, that the true rule seems to be, that, if the nuisance causing the injury necessarily occurs in the ordinary manner of doing the work, the owner will be liable; but not if from the negligence of the contractor or his servants.³ And it is now the prevailing doctrine, that the general owner of real estate is not answerable for acts of carelessness, negligence, and mismanagement, committed upon or near his premises, to the injury of others, if the conduct of the business which causes the injury is not on his account, nor at his expense, nor under his orders or efficient control.⁴ Thus the owner of real estate, who contracts with a responsible party to erect a building thereon, and surrenders the premises to him for that purpose, is not liable for injuries to third persons, occasioned through the negligence of such contractor or his servants.⁵ So the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.⁶ So where A agreed to convey land to B, and B agreed to build a house thereon and pay for the land, and, while the agreement was in force, B, in preparing to build the house, on his own sole account, by workmen employed by himself alone, undermined the wall of the adjoining house of C, whereby it was injured; it was held that A was not answerable for this injury, although the title to the land remained in him at the time when the injury was committed.⁷ So the owner of land is held not answerable to his adjoining neighbor, for damages resulting from the act of contractors, who had the entire control of the premises to erect a building, provided the act causing the damage was not specified to be done by the contract.⁸ And, on the other hand, where A contracted with B and C to build her

¹ Per Lord Denman, *Milligan v. Wedge*, 12 Ad. & Ell. 737.

² Per Lord Chan. Cranworth, *Reedie v. London, &c.*, 4 Exch. 244.

³ *Scammon v. Chicago*, 25 Ill. 424. See *Chicago v. Robbins*, 2 Black, 418.

⁴ *Earle v. Hall*, 2 Met. 353.

⁵ *Scammon v. Chicago*, 25 Ill. 424.

⁶ *Hilliard v. Richardson*, 3 Gray, 349. 2 Met. 353.

⁸ *Gilbert v. Beach*, 4 Duer, 423. Reversed, 16 N. Y. 606.

a house, to be finished complete; and B and C employed D, a blacksmith, to make and place a grating in the area; and the hole over which the grating was to be placed was left uncovered, and E fell into it, and broke his leg: held, B and C, the first contractors, were liable to E.¹ So a wall was erected on the defendant's boundary line according to a written contract, he furnishing the materials, but not hiring the workmen, or overseeing or having any other connection with the work. Held, no relation of master and servant, or principal and agent, existed between him and the builder, and therefore he was not liable to his neighbor, for damages incurred, by the wall's blowing down before completion.² So the owner of land, who contracts with competent mechanics for the erection of buildings thereon, is not liable to third persons for injuries occasioned solely by their negligence while prosecuting the work. As where a carpenter, who had agreed to construct a suitable gutter and pipe to lead the water from the roof into the drain, omitted to do so, and in consequence the water flowed on the plaintiff's land and injured his goods. Though it would be otherwise, if the injury was occasioned by the neglect of the owner to make a connection between the pipe and the drain, which he had undertaken by himself or his agent to make.³ So where A, about to erect a building on his lot, contracts with B to furnish and set the marble for the front, agreeably to certain specifications, and for a definite sum, and neither interferes with the work nor reserves any right of interference or direction; A is not liable to a third person for an injury sustained in consequence of the negligence of B's employees engaged in setting the marble. They are not A's servants.⁴

§ 15. The question, indirectly involved in almost all the cases upon this subject, and more especially in those relating to real estate, has also been more distinctly raised, whether the general exemption from liability for the negligence of a contractor is applicable to contracts, either by their terms involving, or in their execution causing, what the law technically considers a *nuisance*. (See chap. 18, § 13 *a*.) Upon this subject it is said: "It is not necessary to decide whether, in any case, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by others

¹ McCleary v. Kent, 3 Duer, 27.

² Benedict v. Martin, 86 Barb. 288.

³ Gilbert v. Beach, 5 Bosw. 445. But see 16 N. Y. 606.

⁴ Potter v. Seymour, 4 Bosw. 140.

not standing in the relation of servants to him, or part of his family. It may be that in some cases he is responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants.”¹ And the general rule is laid down, that, although the *immediate agent* is a *contractor*, — if the work is such as involves a nuisance in the ordinary doing of it, the employer is liable.² Thus if the owner of real estate in a city contracts with undertakers to erect a building for him, and in pursuance of that contract excavations are made up to the edge of the pavement; unless proper precautionary measures are adopted, this creates a nuisance, and the owner will be liable for injuries resulting to others from the want of such measures.³ And upon the same principle it is held, that, where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. Thus the defendants, a registered joint-stock company, contracted with W. for the laying of their main gas-pipes, in the streets of Sheffield, having no special powers for that purpose. The servants of W. left a heap of earth and stones, which had been thrown out of the trenches dug for receiving the pipes in one of the streets, and the plaintiff, in passing along the street, tumbled over it and was injured. Held, the defendants were liable.⁴ So the defendant had caused certain vaults to be constructed in front of his house, and within the line of the street, by a contract which provided for the proper flagging of the sidewalk above the vaults. More than a year after the completion of the work, the plaintiff was precipitated into the area, by the giving way beneath him of a flag-stone, which formed part of the covering of the vaults. The testimony as to the manner in which the work had been executed was conflicting. Held, the defendant was liable.⁵

§ 15 *a*. But where A contracted to pave a district, and B contracted with him to pave a particular street, A supplying the stones, his carts being used to carry them; and, in the course of the work,

¹ *Reedie v. London, &c.*, 4 Exch. 244.

² *Ware v. St. Paul*, 2 Abb. (U. S.) 261.

³ *Matheny v. Wolffs*, 2 Duv. 137.

⁴ *Ellis v. Sheffield, &c.*, 22 Eng. L. & Eq. 198; 2 Ell. & Bl. 766; 5 Duer, 495.

⁵ *Congreve v. Morgan*, 5 Duer, 495. See *Potter v. Seymour*, 4 Bosw. 140.

B's men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff: held, that A was not liable, although the act amounted to a public nuisance.¹ So the defendants contracted with A, to fill in the earth over a drain which was being made for them across a portion of the highway, from their house to the common sewer. A, after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained personal injury. A few days previous to the accident, and before the work was completed, one of the defendants had seen the earth so heaped over a portion of the drain, but, beyond this, there was no evidence, that either defendant had interfered with, or exercised any control over the work. Held, there was no evidence to go to the jury of the defendants' liability.² (a)

¹ *Overton v. Freeman*, 8 Eng. L. & Eq. 479.

² *Peachey v. Rowland*, 16 Eng. L. & Eq. 442.

(a) In the case of *Hilliard v. Richardson*, 3 Gray, 349, Mr. Justice Thomas gives the following comprehensive view of late cases in Massachusetts upon this important subject: "*Stone v. Codman* (15 Pick. 297) was this. The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed."

In the case of *Lowell v. Boston and Lowell Railroad*, 23 Pick. 24, the action was to recover of the railroad the damages which the town had been compelled to pay in consequence of a defect in the highway caused by the construction of the railroad. "The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the

same for a stipulated sum, and had employed the workmen. This defence was not sustained; nor should it have been. It is the corporation that are intrusted by the legislature with the execution of these public works, and they are bound, in the construction of them, to protect the public against danger. They cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders."

In the case of *Earle v. Hall*, 2 Met. 353, "The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury."

The learned judge proceeds to examine the cases, upon which the leading decision of *Bush v. Steinman* purports to rest. "*Stone v. Cartwright* (6 T. R. 411) lays no foundation for the rule in *Bush v. Steinman*. The decision was—that no action would lie against a steward, manager, or agent, for the damage of those employed by him in the service of his principal.

"The case of *Littledale v. Lonsdale* (2 H. Bl. 267), in its main facts, cannot

§ 16. The question of liability of a master for his servant has often arisen in connection with *public officers*. (a) It is held, that the

be distinguished from *Stone v. Cartwright*. The defendant's steward employed the workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants."

Rosewell v. Prior (2 Salk. 460) merely decided that an action for continuing to obstruct lights might be brought against the party who erected the obstruction, though a previous suit had been brought for the original erection, and though the defendant had leased his premises.

In *Michael v. Alestree* (2 Lev. 172), it was held that an action would lie against a master for damage done by his servant in exercising his horses in an improper place.

"The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities. The rule it adopts is apparently for the first time announced. All the opinions given in it lose sight of these two important distinctions: In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under the efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs."

The learned judge proceeds to examine the cases subsequent to *Bush v. Steinman*, and comes to the conclusion that that case "is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been." The case at bar "can only stand, where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—to adopt which would be to ignore all limitations of legal responsibility."

(a) An officer in Morgan's rebel army, who aided in the capture of Mount Sterling, but, as far as appeared, took no part in the robbery of the bank at that place, by a party of soldiers belonging to the same command, is not liable to the bank. *Witherspoon v. Farmers' Bank*, 2 Duv. 496.

A plaintiff, acting without fraud, is

The opinion above quoted is termed "the most exhaustive examination of the point to be found in any case." *Law Reg.*, April, 1864, p. 359. See *Brackett v. Lubke*, 4 Allen, 138; *Michigan, &c. v. Leahey*, 10 Mich. 193. Also, overruling *Bush v. Steinman*, *Painter v. Mayor*, &c., 46 Penn. 213.

Some recent cases are as follows:—

Where a grading contractor agreed with the railroad to remove or burn old perishable materials, as their engineer might direct; held, the owner of wood, burned by the carelessness of an employee of a sub-contractor acting under the engineer's direction, could not recover of the railroad. *Callahan v. Burlington, &c., R.R. Co.*, 23 Iowa, 562.

Where a city has work done by contract, and a servant of the contractor does something unauthorized by the city to the injury of private property, the city will not be liable, though by the contract a general supervision is retained by it over the work. Otherwise if the act which caused the injury were done under and in consequence of the direction of the city. *Nevins v. Peoria*, 41 Ill. 502.

A contracted with B to erect a building, B to carry on the work under the control of the architect, who was declared to be the superintendent of A, A reserving the right to change the plan. Held, A might be responsible for a want of care or skill in the erection of the building, occasioned by the negligence of B. If an injury happens only in consequence of the negligence or want of skill of the contractors, and the owners neither direct nor sanction the manner of doing the work, nor have control of the premises, the owners are not liable. The architect, who knew the walls were unsafe from want of bracing, could not relieve the owner from responsibility by merely directing the bracing to be done. *Schwartz v. Gilmore*, 45 Ill. 455.

A person who erects a building by contract, and employs a clerk of the

not liable for damages sustained by property, while in the hands of a receiver appointed at his instance. *Kaiser v. Keller*, 21 Iowa, 95.

But, on the other hand, receivers are liable for a breach of any obligation or duty fairly and voluntarily assumed by them. *Blumenthal v. Brainerd*, 38 Vt. 402.

head of a public office under government, with power to appoint and remove the servants of the office, who are to be paid by, and give, at his discretion, security to government, is not responsible to an individual, for a loss occasioned by the default of such servant. The servant guilty of the default is responsible. Thus, in England, the postmaster-general is held not answerable for a packet delivered to the receiver at the post-office, and lost out of the office. But the receiver is liable.¹ Nor for the value of a bank-note, stolen by one of the post-office employees out of a letter delivered into the office.² And more especially is this principle applied to a person acting gratuitously for the public. Such party is held not liable for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention; nor for the negligent execution of an order properly given to others. Thus clerks to commissioners, appointed under a lighting and paving act, and intrusted with the conduct of public works, are held not liable in damages for an injury occasioned by the negligence of those persons whom they employ to conduct the works.³ So the plaintiff's vessel received damage, through the negligence and unskilfulness of the master of a steam-tug, which was employed in towing it in the harbor of N. By an act of Parliament, which appointed commissioners of the harbor, it had been provided, that it should be lawful for the commissioners to build or provide steam-tugs for towing vessels into or out of the harbor, and that any person requiring the assistance of a towing-vessel should pay to the commissioners such reasonable compensa-

¹ *Lane v. Cotton*, 1 *Ld. Raym.* 646. See *Boyden v. U. S.*, 13 *Wall.* 17; p. 224.

² *Whitfield v. Ld. LeDespencer*, 2 *Cowp.* 754.

³ *Hall v. Smith*; *Billington v. Same*, 9 *Moo.* 226; 2 *Bing.* 156. See *Scott v. Manchester*, 1 *H. & N.* 59; *Mersey v. Gibbs*, *L. R.* 1 *H. L.* 93.

works to superintend the erection, is not liable for injury occasioned to a workman in the building by reason of its negligent construction, unless he personally interfered or negligently appointed an incompetent clerk of the works, with knowledge of his incompetency. *Brown v. Accrington*, 3 *Hurl. & Colt.* 511.

An action does not lie for the burning of a wood-lot, through the negligence of the servants of one with whom the defendants, a railroad, had contracted to build their road, under the general supervision of their engineer. *Eaton v. European*, 59 *Me.* 520.

In a recent case in Pennsylvania, *Allen v. Willard*, *Leg. Intell.*, *Agnew, J.*, remarks: "The principle extracted from

the cases is said to be, that a person, natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them; and that when an injury is done by a person exercising an independent employment, the party employing him is not responsible. . . . This doctrine . . . has regard to cases where the purpose of the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed can lawfully commit its performance to others. . . . Nor does the principle extend to cases where the employer of the contractor has not relinquished his control over the work." *Acc. Callahan v. Burlington*, 23 *Iowa*, 562.

tion as the commissioners should fix. An arrangement had been entered into between the commissioners and the proprietors of the steam-tugs, which had previously plied in the harbor, without being subject to any control of the commissioners, that the proprietors should employ their boats at a reduced scale of charges, and that the commissioners should pay them an annual compensation for the reduction. The steam-tugs had been, by consent of the proprietors, placed under the control of the harbor-master, who was authorized by the act to give directions respecting the management of vessels in the harbor. Held, the plaintiff could not maintain an action against the commissioners.¹

§ 16 *a*. On the other hand, one employed by a public officer is himself held liable for the consequences of his own negligence. Thus an action on the case lies against paviors, employed by the commissioners appointed by Parliament for paving the streets, for raising the pavement in front of the plaintiff's houses, by which the passage and lights to the houses are obstructed.² So a draw-tender of a bridge, appointed by the governor, with a salary, and giving bonds, having full control and direction of all vessels passing the draw, of the opening of the draw, and the care of the lamps, is liable to one injured in passing.³

§ 16 *b*. And similar questions of liability have arisen, where the position of parties is reversed, and it is sought to charge a party, for a loss arising from the fault or neglect of a public officer whom he has employed. In reference to a case of this nature it is said, that, where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much per barrel, and, while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk; it was held that the employer was not liable for the injury.⁴ And the same rule is more especially applied, where the loss is owing to a servant of the public officer himself. Thus the buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of

¹ *Cuthbertson v. Parsons*, 10 Eng. L. & Eq. 521.

² *Leader v. Moxon*, 3 Wils. 461; acc. 1 Ld. Raym. 646.

³ *Howell v. Wright*, (Mass.) Law Reg., May, 1862, p. 436.

⁴ *De Forrest v. Wright*, 2 Mich. 368.

London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different persons) to the owner's slaughter-house. Mischief was occasioned by the bullock, through the careless driving of the boy. Held, that the owner was not liable for the injury; the boy not being, in point of law, his servant; although the careless driving and accident took place after the boy had driven the bullock beyond the bounds of the city, towards the defendant's house. And it was said that the owner would not have been liable, if the drover himself had been driving at the time of the injury.¹

§ 17. Similar questions have arisen (see chapters 38 and 39) in relation to *corporations* and the officers thereof, or parties claiming under them. Thus it is held, that the corporation of the city of New York, which had ordered a street to be graded, and had contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor; although the contract provides that the work shall be done under the direction and to the satisfaction of certain officers of the corporation.² And, on the other hand, where a license or grant to construct a sewer was given by the city authorities, with the provision that the grantees should cause "proper guards and lights to be placed at the excavation, and should be answerable for any damages which might be occasioned to persons, animals, or property in the construction of the sewer;" it was held that this provision did not enure to the benefit of a stranger, so as to render the grantees liable to such stranger for the negligence of servants or agents, for whose conduct they would not otherwise be responsible.³ (a)

§ 17 a. But the corporation of the city of New York is held liable for injuries to third persons, resulting from the negligence of persons employed by officers of the corporation, in the repair of the public sewers.⁴ So where the mayor and aldermen of Memphis

¹ *Milligan v. Wedge*, 12 Ad. & Ell. 737; 4 Per. & Dav. 714.

² *Kelly v. New York*, 1 Kern. 432.

³ *Blake v. Ferris*, 1 Seld. 48.

⁴ *Lloyd v. New York*, 1 Seld. 369. See 36 N. H. 284.

(a) Where the authorized officers of a city grant a license to a plumber to make and connect pipes for conducting water from the distributing pipes of the city to private houses, under the inspection of the engineer and inspector of sewers, and the plumber, in the employ of private parties, and in the discharge of his employment, neglects so to guard an excavation and mound of earth in the

street that damage is caused thereby, the city is not liable for the damages so caused, the plumber not being in any sense an officer or servant of the city; nor is the city liable for such obstructions unless notice thereof is shown to have been received by the proper officers of the city, or may be presumed from lapse of time. *Dorlon v. Brooklyn*, 46 Barb. (N. Y.) 604.

procured a cistern to be dug, which occupied a portion of a sidewalk of the city; and, it being negligently left open, the plaintiff fell into it and was disabled; held, the mayor and aldermen had the right to cause the cistern to be dug, but were responsible for damages occasioned by the negligence of the agents or servants employed by them for that purpose.¹

§ 18. The *delay* of an agent should be considered as delay of his principal.² So a principal is responsible, either by way of avoiding a contract or otherwise, (*a*) and as against innocent third persons, for the *fraud* of his agent, though unknown to him, if committed while transacting the business of the principal, more especially if the principal receives the benefit; and whether he be sole agent, or one of several, possessing joint authority.³ Thus where the agent, a broker, induced the defendant to enter into the contract, believing that he was acting solely in his behalf, while in fact he was secretly in the employ, and acting for the interest, of the plaintiff, his principal; held, the plaintiff could not enforce the agreement.⁴ So where an agent by fraud purchases property at a sale on execution, at a low price, part of which he afterwards conveys to his principal; the principal cannot hold the property as against the execution-debtor.⁵ So an insurance company is bound by representations as to the amount of capital stock paid in and invested, made in reply to inquiries of applicants for insurance by an agent for soliciting risks, receiving and transmitting applications, receiving back and delivering policies, and receiving premiums; especially if expressly authorized to make the representations by corporate officers.⁶ So the act of a cashier, making an arrangement with the stockholders of another bank not organized, to organize it in evasion of their charter, although illegal; still, if done not for himself or his benefit, but for the bank and the bank's benefit, and beneficial thereto, and known to the directors, or, if unknown, unknown on account of their negligence, and not repudiated, exposed, or neutralized, is the act of the bank,

¹ Mayor, &c. v. Lasser, 9 Humph. 757.

² Hutcheson v. Blakeman, 3 Met. (Ky.) 80.

³ Smith v. Tracy, 36 N. Y. 79; Bank, &c. v. Davis, 2 Hill, 451; Griswold v. Haven, 25 N. Y. (11 Smith) 595; Durst v. Barton, 47 N. Y. 167; Bank v. State,

13 Rich. 291; Calhoun v. Wright, 23 Tex. 522. See Atlantic, &c. v. Merchants', &c., 10 Gray, 532; Smout v. Ilbery, 10 M. & W. 1.

⁴ Cassard v. Hinman, 6 Bosw. 8.

⁵ Wright v. Calhoun, 19 Tex. 412.

⁶ Fogg v. Griffin, 2 Allen, 1.

(*a*) On the other hand a principal may rescind a fraudulent contract made with his agent. If the agent has taken a note, the principal may with proper notice pro-

duce and cancel the note on the trial. Armstrong v. Tufts, 1 Edm. (N. Y.) Sel. Cas. 367.

and debars it from resorting to the stockholders of the other bank for payment of bills of the latter.¹ So where a bill of exchange was sent to one of the directors of a bank, to be discounted for the benefit of the drawer, and the former, who was at the same time a member of the board which ordered the discount to be made, received the avails, alleging the discount to be for his own benefit; held, that the bank was chargeable with knowledge of the fraud, and therefore could not recover upon the bill.² So a railroad company is liable for the fraud or negligence of its agent, who, from improper motives or against the usage of the company, deprives a person of his rightful facilities for transportation.³ So a principal is chargeable with the fraudulent acts and declarations of a special agent, done and made for the purpose of effecting a sale, though not commissioned to commit a fraud. And, even where a party could not recover damages against a principal on account of the fraudulent representations of his special agent, he may avail himself of those representations by way of defence to an action on the contract by the principal.⁴ And though the principal was not aware, at the time, that the representations of his agent were false, he is nevertheless liable, on the principle that, of two innocent parties, the one shall suffer whose agent causes injury to the other.⁵ (a) But the principal is not liable, if the agent had no knowledge that the representation was false, and the principal did not instruct him to make it, though the principal had knowledge as to the fact misrepresented. Thus the defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant well knew. On the faith of the agent's description, the plaintiff bought the house. Held, that the plaintiff could not maintain case for deceit against the defendant; it not appearing that the

¹ Robinson v. Bealle, 20 Geo. 275.

² Bank, &c. v. Davis, 2 Hill, 451. See Nelson v. Cowing, 6 Hill, 336; Gibson v. Colt, 7 Johns. 390; Sandford v. Handy, 23 Wend. 260; 2 Denio, 235.

³ Galena, &c. v. Rae, 18 Ill. 488.

⁴ Concord Bank v. Gregg, 14 N. H. 331.

⁵ Hunter v. Hudson, &c., 20 Barb. 493.

(a) More especially, where a principal, knowing a material objection to his property, employs an agent, who is ignorant of such objection, to sell or let the property, and the latter unconsciously makes a false representation to the purchaser, thereby inducing a contract; the former will be bound by such misrepresentation.

National, &c. v. Drew, 32 Eng. L. & Eq. 1.

A principal is not liable for the unauthorized acts of his agent in withholding a part of the money of the principal in making a loan, or in giving his own notes payable at a future time in lieu of the money in his hands. Kirkpatrick v. Winans, 1 Green (N. J.), 407.

defendant had instructed the agent to make any representation as to rates or taxes.¹

§ 19. But, although a master is civilly responsible for the fraud as well as negligence of his servant, acting in the course of his employment; the general rule applies alike to both descriptions of wrong, that the master is not responsible for acts done by the servant for his own private advantage, out of the scope of his authority, or inconsistent with the course of his employment.² As where a wagoner took rags from a railroad depot to his employer's paper-mill, supposing them to be his.³ So where A, the servant of a wharfinger, untruly and fraudulently signed a receipt, purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C, and thereby wilfully induced C to pay the price to the pretended vendor; it was held, that the wharfinger was not liable, although C's course of dealing was, to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt, and the latter knew it.⁴ So, in late cases, parties were held not liable for the *usury* of their agents.⁵ (a)

§ 20. While a master is in general responsible for the wrongs

¹ Wilson v. Fuller, 3 Ad. & Ell. N. S. 1009, reversing Fuller v. Wilson, 3 Ad. & Ell. N. S. 58.

² Kennedy v. Parke, 2 Green, 415.

³ The Pennsylvania, &c. v. Zug, 47 Penn. 480.

⁴ Coleman v. Riches, 16 Com. B. 104; 29 Eng. L. & Eq. 323; acc. Grant v. Nor-

way, 10 Com. B. 665; Hubbersty v. Ward, 8 Exch. 330; Wilson v. Fuller, 3 Ad. & Ell. N. S. 68; 3 Gale & Dav. 570. See Farmers' v. Butchers', 16 N. Y. 125; Griswold v. Haven, 25 Ib. 595.

⁵ Bell v. Day, 32 N. Y. (5 Tiff.) 165; Fellows v. Commissioners, 36 Barb. 655.

(a) If the purchaser of goods from an agent, knowing that the goods were held by the agent for the account of principals, place the amount to the credit of the agent, against a previous indebtedness of the agent, it is not a payment. If the agent pledge them to secure such a debt, and the pledgee refuse, on demand, to return them to the owner, and sell them at auction, the owner may recover damages for the conversion, or proceed, waiving the tort, to recover the avails of the sale as money had and received to his use. Henry v. Marvin, 3 E. D. Smith, 71.

When one dealing with an agent induces the latter to set off a debt, due from the agent personally to him, against one due from himself to the principal, it is a fraud on the principal, and not binding upon him, unless he ratifies the transaction, with full knowledge of all the facts. McNair v. McLennan, 24 Penn. 384.

Where a broker pledges the goods of his principal as his own, the pawnee cannot claim to retain them against the principal, in trover, for the amount of the lien which the broker had on the goods for his general balance, at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. M'Combie v. Davies, 7 E. 5.

If an agent, authorized to sell goods for money only, sells his own goods and those of his principal in one sale, receiving payment in money and other property, and, while selling his own goods, for the purpose of defrauding his creditors, sells with them, in his own name, the goods of his principal; the principal cannot rescind the sale. Moore v. Thompson, 32 Me. 497.

of his servant; the question arises, whether this is an exclusive liability, or whether the servant is not also responsible. It has been sometimes held, that trover cannot be maintained against a servant who has acted by his master's command, unless it were to do an apparent wrong. That where the master's case depends *on a title*, as where the command is given under the color of a right, whether valid or not, the servant will be excused. For it would be unreasonable to require the servant to scrutinize the master's title, and thus to make him in all cases act at his peril.¹ (a) And, upon this subject, it is said, by an approved writer: "It has been supposed, that trover cannot be supported against a servant, for an unlawful intermeddling with the goods of another, by the command of his master, unless such intermeddling amount to a trespass; but this doctrine appears to have been overruled, and trover may be supported against a servant or agent, or any other person, who intermeddles with or unlawfully converts goods to the use of another. And it is clear that a servant cannot plead the command of his master or principal, to what in point of law is a trespass. However, for deceit on the sale of goods, as for a false warranty, in general, when the agent acted in pursuance of the direction of his principal, the action must be against the latter. A servant or deputy cannot, in general, be sued for a mere non-feasance; but for misfeasance or malfeasance, an action may in some cases be supported against a servant or deputy. And no action is sustainable against an intermediate agent or steward, for damage occasioned by the negligence of a sub-agent, but the action must be against the principal, or the person who actually committed the injury."²

§ 20 a. As thus suggested, in reference to *intermediate* agents or servants, it is held, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, only, are liable.³ Thus, in an action to recover for an injury sustained by reason of alleged negligence in blasting

¹ Mires v. Solebay, 2 Mod. 242; Berry v. Vantries, 12 S. & R. 89, 92. See White v. Madison, 26 N. Y. (12 Smith), 117. ³ Stone v. Cartwright, 6 T. R. 411. See Grylls v. Davies, 2 B. & Ad. 514; Wilson v. M'Laughlin, 107 Mass. 587; Stockbridge v. Cone, 102 Mass. 80.

² 1 Chit. Pl. 74, 75.

(a) A *military officer*, acting under the martial law, is justified by an order from a superior officer, apparently within the scope of his authority. If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable. Despan v. Olney, 1 Curt. 306.

rocks, it appeared that one A contracted to do the stone-work and masonry on a railroad, and, with his men, commenced quarrying stone from a certain ledge. He afterwards employed the defendant, as his general agent, to superintend all the work upon his contract; and, as such agent, the defendant gave to one B, the special agent of A, who had charge of the blasting on the ledge, general directions respecting the work upon the ledge. B gave the directions relative to the particular blast, by which the injury complained of in this action was incurred; and the defendant, at the time of the blast and previously, was in another part of the ledge, paying no attention to the preparation of the blast. Held, the action should have been brought against A or B, and that it could not be sustained against the defendant.¹ So the president of a corporation is not made liable to an action for a personal injury, merely by transmitting an order of the corporation to a servant, who in executing it uses illegal force. Otherwise, if the order is issued by him on his own responsibility.² So public officers of the government are held not liable for subordinates.³

§ 20 *b*. And the general doctrine above referred to has been often applied, that a servant or deputy is not chargeable, as such, for *neglect*, but only for *misfeasance*; but recourse must be had to the principal;⁴ that, where an agent neglects to perform a duty which he owes to his principal, and third persons are thereby injured, their remedy is against the principal, and not against the agent.⁵ And where the court qualified this proposition by adding, that, where there was negligence *in the doing of an act*, and injury thereby was done to another, an action could be sustained against the agent; it was held erroneous.⁶ Thus, where the plaintiff was the assignee of a certificate of stock, standing in the name of another person, in a foreign banking corporation, which had a transfer office in New York, under the charge of the defendant, an agent authorized to register transfers, who unjustly refused to permit A's stock, which was registered in that office, to be transferred to him on its books; it was held, that an action could not be maintained.⁷ (*a*)

¹ Brown v. Lent, 20 Vt. 529.

² Hewett v. Swift, 3 Allen, 420; Woodward v. Webb, 65 Penn. 254.

³ Richmond v. Long, 17 Gratt. 375.

⁴ Lane v. Cotton, 12 Mod. 472, 488. See Boyden v. U. S., 13 Wall. 17.

⁵ Denny v. Manhattan Co., 2 Denio, 115.

⁶ Henshaw v. Noble, 7 Ohio, 226.

⁷ Denny v. Manhattan Co., 2 Denio, 115.

(*a*) A ticket agent in the employ of a railroad, who, as a matter of convenience to passengers, and without compensation, receives and stores baggage, is not liable

§ 20 *c.* But the prevailing doctrine is, that an action, based even on the *negligence* of persons doing work, lies against them, as well as their employers; ¹ that the command of a superior, to commit a *trespass* or other *unlawful act*, is no justification to an inferior; ² (*a*) that the servant is only to obey his master in matters that are "honest and lawful;" ³ and that, if one person commit an unlawful act of misfeasance under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party. ⁴ Thus an agent, who has wrongfully obtained property, cannot defend against the injured party, on the ground that he acted only as agent, and has paid over the money to his principal. ⁵ So a contractor, employed by a board of health to do a par-

¹ Hardrop *v.* Gallagher, 2 E. D. Smith, 523.

² Brown *v.* Howard, 14 Johns. 118; Perkins *v.* Smith, Sayer, 40; Mires *v.* Solebay, 2 Mod. 244.

³ 1 Bl. Com. 430.

⁴ Johnson *v.* Barber, 5 Gilm. 425; Richardson *v.* Kimball, 28 Me. 463.

⁵ Wright *v.* Eaton, 7 Wis. 595.

for its loss, without proof of ordinary negligence; and, in the absence of special contract, evidence is admissible to show what his custom was in relation to the storage of passengers' baggage. Green *v.* Birchard, 27 Ind. 483.

An agent, employed to collect a draft, is not guilty of a fraudulent concealment, in omitting to disclose to the payer material facts in relation to the draft, having no means of knowing that the payer is not already acquainted with them. Johnson *v.* Bank, 5 Rob. 554.

In general, an agent may make the same defence which his principal might make. Thus the defendant, while at home on a visit to his father, impounded the plaintiff's cattle, doing damage on the father's land, but with the approbation of the father, and the assistance of a boy sent to him for the purpose. The defendant and his father had previously consulted as to the expediency of such impounding. Held, the defendant might make the same justification which the father might have done. Barrows *v.* Fassett, 36 Vt. 625.

A mere contractor, though upon a public work, who is not a public officer, is not liable to third persons for damages occasioned by the non-performance of his contract. Fish *v.* Dodge, 38 Barb. 9.

There is a material and plain distinction between obligations or duties imposed by law, as upon public officers, and those created by contract merely. The former are created for the benefit of, and are due to, every one who has occasion for, or an interest in their performance; and

hence any one, peculiarly injured by their non-performance, may maintain an action against him who owes the duty. But the latter rest between the contracting parties alone, and none but parties or privies can enforce or maintain an action upon them. *Ibid.*

Thus one, who has contracted with the State to keep a section of the Erie Canal in repair, is not liable to an individual who has sustained damages in consequence of his neglecting to perform that duty. The principle, *respondet superior*, does not apply to such a case, and affords no shield to the contractor, who is exercising an independent employment under a contract, and is in no sense a servant or agent of any one. *Ibid.*

On the other hand, neither the contracting boards, nor the canal commissioners, incur any liability. Nor is the sovereign, or State, liable, because negligence in the selection of an agent or a servant cannot be imputed against the State. *Ibid.*

(*a*) A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. 3 Stark. Ev. 1445, n. y.

No action lies against the owners of a transport vessel employed by the government, for damage done in the execution of positive orders of an officer of the royal navy, in command of her. This exemption depends not on martial law, but on the fact that in such case there can be no negligence. Hodgkinson *v.* Fernie, 20 Eng. L. & Eq. 306.

ticular act, if guilty of negligence in doing the act, is personally liable for the consequences ; notwithstanding the *Health of Towns Act*.¹ So agents for the collection of rent, under whose direction a broker acted in levying a distress-warrant for rent, signed by them, after a sufficient tender of the amount due, are liable in trespass.² So an agent, who negligently directs water to be admitted to the water-pipe in a room of a house owned by his principal, but of which he has the general management, is guilty of misfeasance, and is liable to the tenant of the shop below for the damages resulting from such admission. And the fact, that the room, in which the pipe is, is leased to another tenant at the time, is not conclusive against his liability.³ So A, having entered the close of the plaintiff, and cut a quantity of cord wood, sells it to B, who hires the defendant, the master of a coasting-vessel, to go in company with C, and transport the wood to market. Held, the defendant was liable for the value of the wood in an action of trespass *qu. claus.* brought by the plaintiff, although he was ignorant of the original trespass committed by A.⁴ So one who digs a hole in a street, and leaves it open and unprotected, is liable for damages arising therefrom, even though he is in the employ of the State, and acts under its control in digging the hole.⁵ And, in an action against an inferior officer, evidence that he acted under the authority and in pursuance of the orders of his superior is not admissible, if his superior had no authority to issue such orders.⁶

§ 20 *d.* And the rule more especially applies, where the *agency is not disclosed*. Thus one who exchanges counterfeit money for an agent, supposing him to be the principal, may proceed against either, upon learning the fact of the agency.⁷ (a) But it is also held, that an agent, though professedly acting as such, is individually responsible to the purchaser, for a fraud committed by him in the sale of property.⁸ So, when money is paid to an agent by fraud or duress, or when his principal has no legal right to it, or when it is paid to him by mistake ; it may be recovered from the agent, so long as it has not been paid over to his principal, nor his

¹ Arthy v. Coleman, 8 Ell. & Bl. 1092.

² Bennett v. Bayes, 5 Hurl. & Nor. 391.

³ Bell v. Josselyn, 3 Gray, 309.

⁴ Higginson v. York, 5 Mass. 341.

⁵ Bliss v. Schaub, 48 Barb. 339.

⁶ Jones v. Commonwealth, 1 Bush, 34.

⁷ Fishback v. Brown, 16 Ill. 74.

⁸ Campbell v. Hillman, 15 B. Monr. 508.

(a) Where an agent has incurred personal liability by not communicating the name of his principal, he is not discharged from such liability by the fact,

that the principal agreed with A to submit the matter in dispute to arbitration. Nason v. Cockcroft, 3 Duer, 366.

situation altered, relatively to his principal, as touching that fund. So, if notice be given, the agent will be liable, even if he does pay it over, or his situation is afterwards altered.¹ And an auctioneer, who receives and sells stolen property, innocently, and in the ordinary course of his business, is liable to the owner for a conversion, though he has paid over the money to the felon before he knew of the theft, and though the thief be not prosecuted to conviction.²

§ 21. Notwithstanding some contrary authorities (see § 20), the general rule upon this subject is applied to trover as well as other actions for tort; that it is no defence, that the defendant acted under the employment of another, who was himself a trespasser.³ Thus trover will lie against an overseer, for an innocent conversion by him for the benefit of his master, whether with or without his authority.⁴ So where a cartman, at the request of another person, takes goods and carries them away on his cart, under circumstances sufficient to put him on his guard as to the legality of the taking; he is equally liable with the employer to an action of trover for the goods, at the suit of the owner.⁵ And a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.⁶ Or though he disposes of the goods to his master's use, whether he has any authority or not for so doing from the master.⁷ And one who, as agent, intermeddles with the goods of another, is guilty of a conversion, if the act would have been such if done by his principal, although he was ignorant of the owner's title; and may be sued in trover, although he has parted with the possession to his principal.⁸ So the defendant, a jeweller, received from A and wife a set of diamond earrings and pin, belonging to the plaintiff, supposing they were the owners; and as their agent, and for their accommodation, negotiated a sale of them to R. & B. of New York city for \$200. He received the proceeds of sale, and paid them over to A, in ignorance of the plaintiff's title, and without any charge for services. Held, he was liable in trover.⁹

§ 21 *a*. A having lawfully received certain bills from B, a trader, C came to him, and, stating that he was acting on behalf of Messrs. Y. & Co., creditors of B, demanded the bills from A, and,

¹ McDonald v. Napier, 14 Geo. 89.

² Rogers v. Huie, 1 Cal. 429.

³ Gaines v. Briggs, 4 Eng. 46.

⁴ Porter v. Thomas, 23 Geo. 467.

⁵ Thorp v. Burling, 11 Johns. 285.

⁶ Stephens v. Elwall, 4 M. & S. 259.

⁷ Perkins v. Smith, 1 Wils. 328; Sayer, 40.

⁸ Lee v. Mathews, 10 Ala. 682; Per-
minter v. Kelly, 18 Ala. 716.

⁹ Dudley v. Hawley, 40 Barb. 397.

upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that, if they were not, A would be compelled to give them up by the commissioner, and the expense would cost A £200, and the commissioner would be very angry. A was at the time ill in bed, and, being greatly alarmed, gave up the bills. Held, that this was no conversion by C, as trespass would not have been maintainable. But, it appearing that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding, he delivered them to Y. & Co.; held, this was a conversion.¹

§ 21 *b*. But the refusal of a servant to deliver goods intrusted to him by his master, on a demand made by a stranger, is held not sufficient evidence of a conversion, in an action by the latter against the servant.² (*a*)

§ 21 *c*. In an action for conversion of machinery in a workshop, by refusal of A, an agent, to allow its removal, there was no proof that the defendant or A ever actually used it, or had actual possession of it, except by being in rightful possession of the shop. The defendant had instructed A to forbid such removal, but to use no force. Upon a demand, including machinery to which the plaintiff had no title, A forbade the removal of any of it. The jury were instructed, that the evidence showed such an assumption of control or dominion over the property, to the exclusion or in defiance of the plaintiff's right, as would amount to a conversion. Held, erroneous, the facts raising a question for the jury. In the same case, evidence was offered to prove that the defendant, in his employment of, and instructions to A, was merely acting as president of a corporation, which A well knew. Held, it was a question for the jury, whether, in his refusal, A was acting as agent of the corporation or the defendant; and, if as agent of the former, the action was not maintainable.³

¹ Powell v. Hoyland, 2 Eng. L. & Eq. 362.

² Mount v. Derick, 5 Hill, 455. See Rogers v. Weir, 34 N. Y. 463.

³ Delano v. Curtis, 7 Allen, 470.

(*a*) Nor will such demand and refusal be sufficient evidence of a conversion to charge *the master*, unless the servant refused under directions from the master. Mount v. Derick, 5 Hill, 455.

vant, he refuse to deliver, because he has no authority, and his conduct be afterwards approved by the master for that reason, the approval will not render the latter chargeable with a conversion. Ibid.

Though, on demand made of the ser-

§ 21 *d.* It has been held, that a servant may sometimes justify a positive act of force by the command of the master. Thus the bringing of his fellow-servant *vi et armis* from a conventicle or an alehouse.¹ So also in defence of his master. But this justification will be strictly limited to such defence. Thus, in trespass for assault and battery against A and B, A pleaded *son assault*, and B pleaded, that he was servant to A, and that, the plaintiff having assaulted his master in his presence, he, in defence of his master, struck the plaintiff. Held, on demurrer, the plea was ill; for the assault on the master might be over; and the servant cannot strike by way of revenge, but in order to prevent an injury; and he should have pleaded, that the plaintiff would have beaten the master, if the servant had not interposed, *prout ei bene licuit*. The plaintiff had judgment.²

§ 21 *e.* Recent cases illustrate the question, whether wrongful acts may be defended as having been committed under the compulsion of public and military authority.

§ 21 *f.* It is a good defence, to an action of trespass against an officer of the navy for acts done by him, that they were done by virtue of lawful and public orders from the President of the United States and the Secretary of the Navy.³ So, in an action by the owner of an estate devastated by the Confederate army, in their occupation of it, against non-combatant citizens for aiding in such devastation; it appeared that such assistance was rendered under a military requisition, and there was also evidence tending to show that the plaintiff, either from necessity, or satisfied with the assurance of the commanding officer that all damages should be assessed and paid, acquiesced. The damages were assessed, but whether the account was ever satisfied was not clearly determined. Held, the defendants were not liable; because their agency was involuntary, and their submission to the *de facto* government was not only compelled, but legalized; and because they had a right to believe that the plaintiff, trusting to the assurance that all resulting damages should be paid, sanctioned what was done, and waived all claim against the defendants.⁴ But, in an action for procuring arrest and imprisonment, the fact, that the statements of the defendant which led to the arrest were made under military compulsion, is no defence, if the defendant knew them to be false,

¹ 2 Mod. 167.

² *Barfoot v. Reynolds*, 2 Stra. 953.

³ *Durand v. Hollins*, 4 Blatch. C. C. 451.

⁴ *Baker v. Wright*, 1 Bush, 500.

and intended thereby to secure the arrest.¹ And, although a trespass is committed by order of the authorities of a State acting in pursuance of the law thereof; it cannot be justified, when the State is engaged in rebellion against the government and laws of the United States.² So where the defendants, who were Confederate soldiers, sought to justify the taking of the plaintiff's horse, under orders from their officers; held, in order to relieve them from liability, the orders and the circumstances by which they were surrounded must have amounted to duress.³

§ 22. With regard to *the liability of the servant to the master*, (a) it is somewhat difficult to deduce, from the authorities, any general rule, other than those which pertain to the general relation of *bailment*, (b) and which may be considered to include the relation of master and servant, more especially whenever *property is intrusted* to the latter. In general, a servant is not liable to the master without proof of positive neglect or wrong; or the want of reasonable care or skill.⁴ Thus an agent is not liable to his principal for proving a note, due to a creditor out of the State, and therefore not barred by a discharge, in insolvency.⁵ So an agent to sell is liable to his principal, without demand, if he neglects or refuses to render an account within reasonable time after the sale; but, after account rendered, he is not liable for the money, until demand.⁶ So where the cashier of a bank is employed to sell shares therein at a fixed price, but, before he has completed the sale, the bank is enjoined and proved insolvent; he is not

¹ Huggins v. Toler, 1 Bush, 192.

² Lively v. Ballard, 2 W. Va. 496.

³ Witherspoon v. Woody, 4 Cold. 605.

⁴ See Natcher v. Natcher, 47 Penn. 496.

⁵ Gorman v. Wheeler, 10 Gray, 862.

⁶ Haas v. Damon, 9 Iowa, 589.

(a) See *Tod v. Benedict*, 15 Iowa, 591. In general, *sub-agents*, acting *ex contractu*, are responsible only to the immediate agents who employ them, and not to the principals of such agents. And it is held, that the case of public officers is not necessarily an exception to this rule, although, under particular circumstances, an exception may arise. *Trafton v. United States*, 3 Story, 646.

The owner of goods has a right to waive a tort, as against factors, and to bring an action to compel them to account. He may show how the factors became possessed of the goods; and though it is proved that they became possessed of them wrongfully, still the action against them as factors will be sustained. Since he waives the tort and

sues the defendants as factors, he can recover only the net proceeds, deducting charges, &c., and not the absolute value of the goods. *Lubert v. Chauviteau*, 3 Cal. 458.

The defendant was master and part-owner of a vessel, and sold her cargo, of which the plaintiff was part-owner, and received the proceeds. Held, the plaintiff might maintain an action on the case against the defendant for his share of such proceeds. *True v. McGilvery*, 43 Me. 485.

In a late case in Pennsylvania, — *Shreeve v. Adams*, — it is held that a broker may be sued in case for neglect of duty to his principal.

(b) See *Bailment*.

responsible for the supposed value of the stock, no neglect on his part being shown in forwarding the sale.¹ So it is held, that, if the servant of a common carrier accidentally lose goods intrusted to his master to carry, the master cannot maintain an action against him for the value, unless he can prove negligence, and has paid the money to the owners.² So, in cases of unforeseen necessity and emergency, agents have an implied authority to act for the interest and benefit of the principal, if they exercise a sound discretion. A lot of hay was sent to an agent at New Orleans during the rebellion for sale. He sold a portion to the military officers of the United States for cash; the remainder was seized by military authority. The officers refused to pay, except in certificates of indebtedness of the United States, which were accepted, and sold by the agent at a discount. Held, the agent was not liable for such loss, as he acted in good faith, and according to the usage of brokers at that time.³ So the plaintiff intrusted the defendant with goods to sell in India, agreeing to take back what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. The defendant, not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held, trover did not lie.⁴ So a banker in London, receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment, is not guilty of negligence, in giving up such bills to the acceptor, upon receiving a check upon the banker for the amount, although it turn out that such check is dishonored.⁵ (a) And the master can enforce the liability of the servant only in the precise form adapted to the circumstances of the case. Thus an action against a factor, "for not selling for the best price," is not supported by evidence of a reduced price by reason of a delay in selling.⁶ So one who has undertaken, without compensation, to lend moneys for another, and to take "good and sufficient security" for the loan, and has made the loan

¹ Washburn v. Blake, 47 Me. 316.

² Savage v. Walthew, 11 Mod. 135;
Brooks v. Lawrence, 1 Edm. Sel. Cas. 496.

³ Greenleaf v. Moody, 13 Allen, 362.

⁴ Bromley v. Coxwell, 2 B. & P. 438.

⁵ Russell v. Hankey, 6 T. R. 12.

⁶ Merle v. Hascall, 10 Mis. 406.

(a) An agent who transfers, for a valuable consideration, negotiable instruments belonging to his principal, contrary to his instructions, and converts the money to his own use, is not liable to

the extent of the liability thereby imposed on his principal, but only to the extent of the consideration so received by him. Wolf v. Brouwer, 5 Rob. 601.

accordingly to one who was solvent at the time, taking from him a mortgage which was then a sufficient security, and delivering it to his principal, is not liable for negligence, on the mortgage afterwards becoming worthless by the failure to record it; this being attributable to the principal rather than to the agent.¹ So an agent, employed to make a sale and collect the proceeds, on receiving from the purchaser a bank draft payable to his own order, is not acting in violation of his duty in reducing it into money, and passing it to his own credit in bank; and in an action by the principal, brought to recover the draft or the money, with damages for its wrongful detention, the plaintiff is properly nonsuited. The variance between the allegation and proof is not covered by the provisions of the New York Code, but the allegation is unproved in its entire scope and meaning.² So it seems, that, where an agent is authorized to deliver goods to a third person, on receiving sufficient security for the amount, and delivers them without sufficient security; trover will not lie against him, but the proper remedy is an action on the case.³ So if a broker, authorized to sell goods for a certain price, sells them for a less price, the remedy is an action on the case.⁴ (a)

§ 22 a. But a servant is liable to his master for injuries caused by his negligence, although the negligence of another servant, not made defendant with him, concurred in producing such injuries.⁵ And a servant, who takes away his master's goods upon leaving his service, is thereby guilty of a conversion, and liable in trover or replevin without demand.⁶ So if a factor dispose of the goods by a delegation of his power, without the sanction of his principal, or of a usage of trade, it is a conversion of the goods by the factor, and the principal may either sue in trover, or waive the tort, and recover the value of the goods in assumpsit.⁷ So the defendant, a

¹ *Turton v. Dufief*, 6 Wall. 420.

² *Walter v. Bennett*, 16 N. Y. 250.
See *Robinson v. Illinois*, 30 Iowa, 401;
Baird v. Hall, 67 N. C. 230; *Blosser v. Harshbarger*, 21 Gratt. 214.

³ *Cairnes v. Bleecker*, 12 Johns. 300.

⁴ *Dufresne v. Hutchinson*, 3 Taunt. 117.

⁵ *Zulkee v. Wing*, 20 Wis. 408.

⁶ *Pilsbury v. Webb*, 33 Barb. 213.

⁷ *Campbell v. Reeves*, 3 Head, 226.

(a) While, as has been seen, a party is not liable for the acts of one with whom he has merely contracted, as for those of a servant; on the other hand, the liability of the latter to the former will be limited by the terms of his contract. Thus A, by a contract with a municipal corporation, undertook to construct a sewer in a public street. While

in process of construction, he omitted to keep lights and to maintain guards and barriers, and B, while passing along the street, fell into the pit, was injured, and recovered therefor a large sum from the corporation. Held, as the contract did not bind the contractor to keep lights, &c., he was not liable to the corporation. *Buffalo v. Holloway*, 3 Seld. 493.

factor, was instructed by the plaintiff, his principal, to sell wheat on consignment, at a certain price, on a certain day; or, if not then sold, to ship it to New York. On the day fixed, he gave a refusal till the next morning, and the next day perfected the sale. Held, he was liable, as for a conversion, and for the highest market price between the time of sale and a reasonable time thereafter for the commencement of an action. Also, the conversion having taken place at Buffalo, July 13, and navigation to New York having closed about November 29, that such reasonable time extended to the latter date.¹ So it is held, that, when a party accepts and enters upon even a *gratuitous* agency, he is bound to use such diligence as a prudent man uses in his own affairs.² And an agent for hire, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usage of the place, and the circumstances of the times, in which the business is transacted.³ And if a factor disobeys the orders of his principal, and a loss accrues, he is answerable to the extent of that loss.⁴ If an agent, whose authority is limited by instructions from his principal, exceeds his commission, he is liable to him for the consequences of his unauthorized acts; and it is no excuse that his intention was to benefit his principal.⁵ So it is held to be an agent's imperative duty, to give his principal timely notice of every fact or circumstance, which may make it necessary for him to take measures for his security. Thus an agent for the investment and transmission of money is liable for every default of his sub-agent, during which, by his omission, his principal was left in ignorance of the destination of a draft purchased by him on account of his principal.⁶ And though, where a gratuitous agent collects money for his principal, he is liable for its loss only in case of gross negligence on his part; if he attempt to transmit the money without instructions, and it be lost *in transitu*, he is liable, unless the principal ratifies the act. A ratification may be implied or expressed, but there can be no ratification binding on the principal, unless made with a full knowledge of all the material circumstances of the case. When the agent makes

¹ Scott v. Rogers, 31 N. Y. (4 Tiffa.) 676.

² Anthony v. Smith, 9 Humph. 508. See Indianapolis (City of) v. Skeen, 17 Ind. 628; Myles v. Myles, 6 Bush, 237; Williams v. Higgins, 30 Md. 404; Hines v. Perkins, 2 Heisk. 395.

³ Wright v. Central, &c., 16 Geo. 38.

⁴ Day v. Crawford, 13 Geo. 508.

⁵ Hardeman v. Ford, 12 Geo. 205.

⁶ Clark v. The Bank of Wheeling, 17 Penn. 322.

the remittance without authority, and informs the principal of it, the dissent of the principal must be expressed in a reasonable time. When no mode of remittance is prescribed by the principal, the law prescribes a mode, and that is, the mode which a man of ordinary prudence, skill, and diligence would adopt in view of the current and usage of trade, at the locality, for transmitting his own money.¹ So, in an action on the case for a *deceit*, the plaintiff declared, that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented, that a premium of £150 was to be paid for it, whereas only £100 were to be paid; by means of which fraudulent representation the defendant obtained from him the sum of £50, and converted it to his own use. Held, that these allegations were sufficient, without further stating, that the £50, so obtained, were over and above the £100 to be paid for the lease.² So the plaintiff employed the defendants to sell houses by auction, and to prepare a description of them; and they described two of the houses as containing three stories, whereas they contained only two. The purchaser having compelled the plaintiff, under one of the conditions of sale, to make him compensation for the misdescription; held, the plaintiff might recover the sum thus refunded.³ So a commission merchant cannot detain the proceeds of a sale from his principal, on the ground of outstanding equities between the principal and A.⁴ So an agent, appointed to settle claims against A, received from A notes for the amount, payable at future periods, which were good, and were paid when due; but the agent sold them before maturity for less than their face, without consulting his principals, and without making any inquiries of parties with whom funds had been deposited for payment of the notes. On being called to account, he denied having received any thing on the notes for which he was liable to account. Held, such sale was a clear violation of duty, and warranted a finding that the sale was without authority, and that the principals could recover the excess of the amount of the notes over the sum paid, upon the ground that the notes were good and collectible, and the transactions released the debtor and deprived the principals of all remedy except against the agent.⁵ So the defendant, being employed by the plaintiff to sell furniture for ready money only, sold it, but took in payment a bill of exchange drawn

¹ *Lyon v. Tams*, 6 Eng. 189.

² *Pewtress v. Austin*, 2 Marsh. 217. See *Merryman v. David*, 31 Ill. 404.

³ *Parker v. Farebrother*, 24 Eng. L. & Eq. 237.

⁴ *Aubery v. Fiske*, 36 N. Y. 47.

⁵ *Allen v. Brown*, 51 Barb. 86.

by the purchaser on a third person. The plaintiff refused to take the bill, and applied for the proceeds of the sale, but his agent afterwards obtained the bill from the defendant to get it discounted. It was never presented for payment; the drawer never had notice of its dishonor, and was thereby discharged; and ten days elapsed after it became due, before the defendant had such notice. Held, that the defendant was liable for selling otherwise than for ready money, though it seems the defendant might sustain a cross-action for any damage sustained by him, in consequence of the plaintiff's preventing him by his neglect from recovering on the bill.¹ So where the defendant procured volunteers and had them credited to a borough, but afterwards transferred them to another district; held, if he was the authorized agent of the borough, the borough might maintain an action on the case against him.² (a)

§ 23. The liability of an agent or servant may sometimes be enforced, by way of defence against a claim upon the master for the price of his services. (b) Upon this subject, it is held, that a principal is liable to his factor for all commissions, expenses, disbursements, and advancements made and accruing in the course of the agency on his account and for his benefit, *the agent exercising reasonable skill and diligence, and acting in good faith.*³ But an agent who is unfaithful to his trust, abuses the confidence reposed in him, and misconducts himself in the business of the agency, can recover no commissions or compensation.⁴ And in a suit by the agent against his principal, for his expenses and disbursements, the defendant may show, in bar of the claim, the want of diligence or neglect on the part of the agent.⁵ Thus, A was

¹ Earl of Ferrers v. Robins, 5 Tyr. 705. See Simpkins v. Low, 49 Barb. 382.

² Hart v. Girard, 56 Penn. 23.

³ Brown v. Clayton, 12 Geo. 564.

⁴ Sea v. Carpenter, 16 Ohio, 412; Myers v. Walker, 31 Ill. 353; Audenried v. Betteley, 8 Allen, 302.

⁵ 12 Geo. 564.

(a) With reference to the dealings of an agent, as subject to an implied trust, see White v. Ward, 26 Ark. 445; Condit v. Blackwell, 22 N. J. Eq. 481; Marvin v. Buchanan, 62 Barb. 468; M'Mahon v. M'Graw, 26 Wis. 614; Draughon v. Quillen, 23 La. Ann. 237. A selling agent of a firm is not authorized to sell to another firm in which he is himself interested; and such sales will justify his employers in dismissing him. Reimers v. Ridner, 2 Rob. (N. Y.) 7.

So one assuming even a voluntary agency, under a general power to buy, cannot purchase of himself, and, whether his

purpose be fraudulent or not, his principal may rescind the contract. Conkey v. Bond, 36 N. Y. 427.

And a purchase by an agent in his own name, while in the performance of his office, enures to the benefit of his principal. Von Hurter v. Spengeman, 2 Green, 185.

(b) In an action for services in the making of a contract which is illegal and void by statute, and also for money paid on account of the principal, in the execution thereof, the principal may defend, on the ground of the illegality. Stebbins v. Leowolf, 3 Cush. 137.

employed by a railroad to procure subscriptions to stock, and, in the exercise of such agency, without the knowledge of the company, received reward from persons subscribing lands for stock, for procuring their lands to be taken by the company. Held, the agency in behalf of the subscribers was inconsistent with the agency for the company, was an act of bad faith, and worked a forfeiture of all right to compensation.¹ So where a factor pledges goods, which are intrusted to him for sale on commission, for advances made to himself, and authorizes the pledgee to sell to reimburse himself, he is guilty of conversion; and it seems that the principal, in the settlement of accounts between him and his factor, would be entitled to an adjustment of any claim he might have, for loss or damage resulting from such unlawful pledge.² But if the agent conducted fairly in the sale of the property, obtaining the best prices that by reasonable diligence could be obtained, and accounting honestly according to his best means, and explains his neglect to keep exact accounts, and such neglect involves no gross carelessness or dishonesty; he ought to be allowed, out of the proceeds, all the necessary expenses of managing and disposing of the goods, and a reasonable compensation for his services.³ And, in an action of assumpsit, brought by the principal against the agent for money in his hands, arising from the sale of goods consigned to him, if the defendant sets up in reduction of the plaintiff's demand an account for expenses incurred by him in fitting the goods for sale in market, the plaintiff cannot set up in rejoinder the negligence of the agent. He must bring his action for damages.⁴

§ 24. With regard to *the liability of a master to his servant*, for an injury done to the servant in the course of his employment for the master, the general doctrine is laid down, that a master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and, if he fails to do so, either personally, or by hiring incompetent servants, or providing unsuitable or defective machinery, will be held responsible for damages.⁵ (a) In ordinary cases, where a work-

¹ Cleveland, &c. v. Pattison, 15 Ind. 70.

² Kelly v. Smith, 1 Blatch. 290.

³ Jones v. Hoyt, 25 Conn. 374.

⁴ 12 Geo. 564.

⁵ Hallower v. Henley, 6 Cal. 209;

Chicago v. Northwestern, 55 Ill. 492; Brickner v. Central, 2 Lans. 506; Gibson v. Pacific, 46 Me. 163; Noyes v. Smith, 2 Wms. 59; Ormond v. Holland, 1 Ell., Bl. & Ell. 102; Buzzell v. Laconia, &c., 48 Me. 113.

(a) It has been recently held in Pennsylvania — Johnson v. Bruner, — that an

action for negligence will not lie by a servant against a master, for injuries in-

man is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances,

curring in the course of his employment.

Rule for a new trial.

Opinion by STROUD, J., July 13, 1867.

On the afternoon of June 10, 1866, a son of the plaintiff, aged fifteen years, who was employed on wages at the defendant's factory, fell down a hatchway in the fourth story of the building. This occurred at five and a half o'clock in the afternoon, when it was quite light. It was the practice at the factory to open the hatchway at that hour to let down the waste. The boy was carrying waste from one room to another. A man who was attending to the letting down of the waste, had brought one bag to the hatchway and left it, and was returning to the picker room for another, when the boy walked into the hatchway. The sides of the hatchway were five or six feet long. It had been constructed as part of the plan of the building in 1861, and had been in use ever since. The defendant was a lessee of the factory, not the owner.

The plaintiff's son lost his life by the fall.

The action was in case, under the acts of Assembly of April 15, 1851, and April 26, 1855.

The declaration does not state, in terms, the relation in which the plaintiff's son and defendant stood to each other, but sets out in the usual way, in our courts, that the son was lawfully passing and being at the hatchway, which through the negligence of the defendant was not properly fenced around and guarded, and was dangerous to persons passing by it.

There were several counts of nearly the same import. It may be that one of these might have been demurred to. But the one which I have particularly recited, was undoubtedly good.

The general issue was pleaded.

The evidence on the trial showed plainly that the relation between the plaintiff's son and the defendant was that of servant and master; employer and employee, in the language so much in vogue at the present day.

And where this is the case, it is a principle of law, that no action can be maintained by the servant against the

master by reason of any bodily hurt happening to the former in the course of the business which he has engaged to perform. He takes upon himself all the risk incident to the business. *Priesley v. Fowler*, 3 M. & W. 1; *Hutchinson v. York, Newcastle, and Berwick R.R. Co.*, 5 Exch. Rep. 343; and *Wigmore v. Joy*, Ib. 354; *Couch v. Steele*, 3 Ell. & Bl. 402, 408, 409. *Seymour v. Maddox*, 16 Q. B. R. 326, is another case directly in point. There the plaintiff, a chorus singer, was employed by the defendant to sing at his theatre. There was a dressing-room for the use of the singers, and a floor in it, underneath the stage, having a cut or hole of considerable depth; which cut or hole was left without any guard or fence, and was insufficiently lighted; along and across this floor, persons performing at the theatre, were accustomed, during the performances, to pass and repass. On one of these occasions the plaintiff, while passing along the floor in which the cut or hole was, fell into it and suffered bodily injury. The relation held by the plaintiff to the defendant was disclosed by the declaration. Not guilty was pleaded, and on the trial the verdict was for the plaintiff. A rule *nisi* to arrest the judgment was obtained, and on argument the court made the rule absolute.

In the case before us, the evidence, as has been remarked, showed clearly that the plaintiff's son was in the service of the defendant, on wages. In technical language, the one was master, the other servant.

The decisive effect of this evidence, as a defence, seems not to have been adverted to on the trial.

We feel bound, therefore, to set the verdict aside, as the only way by which the right of the defendant may be maintained.

It may be proper to subjoin, that the immunity of the defendant depends entirely upon the strict legal relation between the parties. This is clearly shown by the recent decision in England in *Indermaur v. Dames*, 1 L. R. C. P. 274.

The rule for a new trial is made absolute.

which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable precisely as a third person, if the loss or injury is caused by his neglect or want of care. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, and which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if known to him; and if he fails to make this disclosure, and the workman while engaged in the service thereby sustains an injury, the employer is responsible in damages.¹ So, although the servant has notice of the danger, if from the assurances of the master he has a reasonable expectation that the defect will be repaired.² Thus a telegraph company is liable for injury received by a workman in its employ, through a defective telegraph pole; and the allegation of negligence is sustained, by proving the danger from the defect in the pole, and that it was known to the defendants.³ So if a railroad company fail to keep their road and track in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers or servants; and if their employees do not know of defects, and contract with express reference to them: the company will be liable for such injuries as their employees may suffer thereby.⁴ So where the plaintiff was a track repairer, and, while thus employed, was run over and injured by a train not running on schedule time; held, the railroad was liable.⁵ And if an employee of a railroad in repairing a track is injured by a train, it is a question for the jury whether the road was not guilty of negligence in failing to furnish the workmen with an accurate time-piece.⁶ So a railroad, which negligently suffers a bridge to remain unsafe, is liable to a servant, injured by the giving way of the bridge.⁷ And, in general, a railroad is bound to see that its road is in good condition and safe, and that the engines are perfect and properly constructed, according to the present improvements in the art; and also to have competent engineers; and, if an injury is occasioned to an employee by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of such defect, or, in the exercise of ordinary care, might have

¹ *Perry v. Marsh*, 25 Ala. 659.

² *Holmes v. Clark*, Law Reg., Dec., 1862, p. 107; 31 L. T. Exch. 356.

³ *Byron v. N. Y., &c.*, 26 Barb. 39.

⁴ *Chicago v. Swett*, 45 Ill. 197.

⁵ *Haines v. East*, 3 Cold. 222.

⁶ *Matteson v. New York*, 62 Barb. 364.

⁷ *Harrison v. Central*, 2 Vroom, 293.

known it. And the knowledge of such defect by an engineer is that of the company.¹ So a railroad is liable for injuries received by a brakeman while in their service, by the breaking of the chain, and giving way of a defective brake while working it; if they procured an improper brake, and placed the brakeman to work it, without an opportunity to know such defect.² Or for injury to a brakeman, by permitting the road to become blocked with snow and ice, and a car to be out of repair, the plaintiff being in no fault.³ So a master is liable for injury to a servant, caused by falling from an unsafe ladder.⁴ So A, a miner, employed to work in the mine of the defendant, went down as usual to his day's work, but he and the other miners, after working a short time, held a meeting amongst themselves, to discuss certain supposed grievances, and they resolved, before working further, to come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock, and go in a body to represent their grievances to the defendant's manager. While so coming up, A was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A's representatives brought an action for damages against the defendant; and the judge told the jury, that the defendant was not responsible for the accident, if A was at the time leaving his work without proper cause, and for a purpose of his own. The jury found that A was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit. Held, reversing the judgment of the Court of Session, that the ruling of the judge was wrong; that a master is liable for accidents occasioned by his neglect towards those whom he employs, while they are engaged in his employment, *eundo, morando, et redeundo*; and that, whether A had just cause for leaving his work or not, and though he were coming up for a cause of his own, still the defendant was responsible, being bound to take A up just as safely as he let him down.⁵

§ 24 a. One who employs a *contractor* to do any mechanical work, does not become a guarantor to all the employees of the contractor for his skill and care in performing the work. The contractor is a principal of the persons whom he employs.⁶ And, as already suggested, the burden of proof is on the plaintiff to show negligence.⁷

¹ Nashville v. Elliott, 1 Cold. 611.

⁵ Marshall v. Stewart, 33 Eng. L. &

² Columbus, &c. v. Webb, 12 Ohio, N. Eq. 1.

S. 475.

⁶ Hunt v. Pennsylvania, 51 Penn. 475.

³ Fifield v. Railroad, 42 N. H. 225.

⁷ Beaulieu v. Portland, &c., 48 Me.

⁴ Williams v. Clough, 3 Hurl. & Nor. 291.

And though bridges, passage-ways, or ladders, necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer; and he is responsible for an injury caused by negligence and want of ordinary care in this respect, the defect occasioning the injury being known to him and not to the servant: if the defect was known to the servant, or to both servant and master, and the servant continued in the service, he assumed the risk himself. Neither can he recover, if his own neglect contributed to the injury. He must show ordinary care on his own part. And the declaration must allege, that the defect was unknown to the plaintiff, known to the defendant, and arose from the want of proper care and diligence on the part of the defendant.¹ In another recent case, the less rigid rule is adopted, that the servant cannot recover, unless the employer knew, *or ought to have known*, of the defect, and the employee did not know of it, *or had not equal means of knowledge*. That every employer has a right to judge for himself how he will carry on his own business, and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service. And where a boy, ten years of age, was employed in a factory, and was injured by being caught in machinery, which it was claimed ought to have been covered in such a manner as to prevent such an accident; it was held, that the question, whether at his age he had a sufficient understanding of the hazards of the employment to bring him within the general rule, was one for the jury. Also, that an action on the case for negligence was a proper remedy.² So the plaintiff, employed as a common laborer by the defendant, a brewer, was engaged in cleaning hogsheads by a steam apparatus, the use of which was explained to him. After he had been so employed for a number of days, he was injured by the explosion of a hogshead, caused by the pressure of steam. There was evidence that the apparatus was unsafe, owing to the omission of a certain gauge or valve, but it did not appear that the defendant knew or had reason to believe that it was dangerous in its actual condition. Held, the defendant was not liable.³ So where an employee in a foundry works with, or in the vicinity of, an insufficient or unsafe piece of machinery, with a knowledge of its condition, he takes the risk incident to his employment.⁴ So when an injury happens to a servant while in the actual use of an instrument, engine, or machine, in the course of his

¹ Buzzell v. Laconia, &c., 48 Me. 113.

² Hayden v. Smithville, &c., 29 Conn.

³ Loonan v. Brockway, 3 Rob. 74.

⁴ McGlynn v. Brodie, 31 Cal. 376.

employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events, if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act (9 and 10 Vict. c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master, that he has in use in his works an engine or machine less safe than some other which is in general use. Therefore, where a laborer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it; held, there was no case to go to the jury, in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant.¹ So a servant cannot recover against the master for injuries sustained in voluntarily using an unsafe hook.² So one having a contract with parties running a railroad, as an employee, with full knowledge of the condition and management of the road, cannot recover for injuries sustained in passing over it.³ So a railroad corporation, exercising reasonable care in providing and using suitable locomotive engines and tenders, are not liable for an injury occasioned by a defect therein to a workman employed by them, while being carried over their road without paying fare. And a carpenter, employed by the day, by a railroad corporation, to work on the road, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him while being so carried, by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles.⁴ So an engineer upon a railroad, who has received an injury resulting from a defect in the locomotive of which he had charge, and from deficient fences, &c., must allege in his complaint, and prove, actual notice to the principal of the defects and deficiencies which occasioned the injury, or some of them. It is the

¹ *Dynen v. Leach*, 40 Eng. L. & Eq. 491.

² *Griffiths v. Gidlow*, 3 Hurl. & N. 648.

³ *Moss v. Johnson*, 22 Ill. 633.

⁴ *Seaver v. Boston, &c.*, 14 Gray, 466.

duty of an engineer, confided to him by his employers, to make known to the company the defects of the engine he has the care of, and to guard against all accidents liable to happen by the escape of horses, &c., from adjoining lands, through the defect of fences or otherwise. He has the knowledge, or the means of knowledge, within his own power; and he is responsible, not only to the public, but to the company, if he does not give information of them.¹ So in the case of an injury to a conductor, by the insufficiency of the cars or machinery, the railroad will not be held as guarantor against the insufficiency; but will be responsible in case of injury received by a conductor without his fault, only in case of a neglect of that reasonable care and diligence as to cars and materials, which it was presumed to exercise, and in contemplation of which its employees make their engagements, and which they have a right to expect. And a conductor must use ordinary skill and judgment, not only in the management of the train, but also in the inspection of the machinery and cars, and, if he suffers any injury through want of such inspection, or from an insufficiency which he might have known by reasonable diligence, or did know, the company will not be held liable. If such injury was caused by latent defects, not discoverable, in the exercise of ordinary care, by either company or conductor, the damage therefrom must be held as among the casualties incident to the business, for which no one could be blamed. The railroad must furnish a sufficient number of hands for the train; if there are not enough, the conductor may refuse to run the train; if he runs the train without the proper number, he waives the obligation of the company and does it at his own risk, and, in case of injury from such running of the train, he cannot claim damages from the company.² The plaintiff must aver and prove, in order to recover judgment in case of injury from alleged negligence of a railroad company, besides the allegation that he did not know of the defects of the cars and machinery, that while acting as conductor he had used due care and diligence in the inspection and use of the cars and machinery while in his charge and under his direction. Between employer and employees there is no general implied warranty, that the rolling stock and fixtures of a railroad are complete and fit. But if the employer, with knowledge of a defect, suffer the road to be run, the employee being ignorant of the defect, or if, both knowing of it, the employer

¹ *McMillan v. Saratoga, &c.*, 20 Barb. 449.

² *Mad River, &c. v. Barber*, 5 Ohio, N. S. 541.

gives special directions as to operating, a compliance with which leads to an accident; he is liable for injuries thereby caused to the employees; and a complaint must allege substantially such negligence.¹

§ 25. While, on principles of public policy, a master is liable to third persons for the misfeasance, negligence, or omissions of duty of his servant, acting within the scope of his employment; the courts have refused, upon considerations peculiar to the relation of master and servant, to apply this rule to cases, where *one receives an injury from the negligence of another*, (a) while both are acting in the common business of the same master,² who is chargeable with no personal negligence or wrong.³ The law requires of masters only ordinary care to employ servants of good habits, and of competent skill and experience, and to furnish them with approved machinery and apparatus. They do not guaranty their faithfulness in carrying on the business, or keeping the works in such repair as to be always safe.⁴ It is said, "They have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part on the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."⁵ Thus, although it is the duty of a railroad company to exercise all reasonable care in procuring for its operation sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for injuries occasioned

¹ Indianapolis, &c. v. Love, 10 Ind. 554.

² Slattery v. Toledo, &c., 23 Ind. 81; Chicago v. Murphy, 53 Ill. 336; Mercer v. Jackson, 54 Ill. 397; Wiggins v. Blakeman, 54 Ill. 201; Banlec v. New York, 5 Lans. 436; Wouder v. Baltimore, 32 Md. 411; Ohio, &c. v. Tindall, 13 Ind. 366; Illinois, &c. v. Cox, 21 Ill. 20; Griffiths v. Gidlow, 3 Hurl. & N. 648; 3 Bosw. 591;

Walker v. Bolling, 22 Ala. 294; 23 Penn. 384; Sherman v. The Rochester, &c., 15 Barb. 574; King v. Boston, &c., 9 Cush. 112; Madison, &c. v. Bacon, 6 Ind. 205.

³ Carle v. Bangor, &c., 43 Me. 269.

⁴ Beaulieu v. Portland, &c., 48 Me. 291.

⁵ Hutchinson v. The York, &c., 5 Exch. 343, 351.

(a) As will be seen hereafter, a different rule prevails where the injury resulted from the servant's *unskillfulness*. Wright v. New York, &c., 25 N. Y. (11

Smith) 562. See Brickner v. New York, 2 Lans. 506; Lansing v. New York, 49 N. Y. 521.

by the neglect of any of his co-servants employed in the same general business of operating the road, even though the negligent servant in his grade of employment is superior to the one injured.¹ Thus a railroad is not liable to an employee for the difference between the time kept by such person and that kept by the regular conductor.² So where a laborer on a gravel-train, riding in a gravel-car from his boarding-place to the place of his work, is injured through the carelessness of the engineer, or by a collision caused by the negligence of the company's servants in charge of the train; the railroad corporation are held not responsible.³ (a) More especially where by agreement he is carried free of charge.⁴ So a brakeman, whose duties are to apply the brakes when directed by the engineer or conductor, cannot maintain an action against the railroad company, for injuries caused by the negligence of their superior officers in running the train at unsafe speed, or other negligence.⁵ So the plaintiff was employed as a trackman, to follow in a hand-car passenger trains over a certain part of the defendants' road-track, to keep it in order and report defects; and, while engaged in this duty in the evening, was run over and injured by a train of the defendants' cars, without lights, not usually passing at that hour, and through negligence, as was claimed, of its managers. Held, the defendants were not liable.⁶ So, to an action by an administratrix against a railway for damages occasioned by the negligence of the company, by their servants, in moving trucks against another truck, which the deceased was assisting in turning, and by such negligence causing his death; it is a good defence, that he was voluntarily assisting the servants, that they were persons of ordinary skill, and competent to move trucks safely, and that their negligence was unauthorized by and without the knowledge of the company. And such defence is admissible under the plea of *not guilty*.⁷ So the plaintiff, an employee of the defendant, a railroad, was employed by the month to render service generally on the road, in the capacity of baggage-master, conductor of pas-

¹ 32 Vt. 473.

² *Weger v. Pennsylvania*, 55 Penn. 460.

³ *Ryan v. Cumberland, &c.*, 23 Penn. 384; *Gillshannon v. Stony Brook, &c.*, 10 Cush. 228.

⁴ *Russell v. Hudson, &c.*, 17 N. Y. 134.

⁵ *Sherman v. Rochester, &c.*, 17 N. Y.

153; *Chamberlain v. Milwaukee, &c.*, 7 Wis. 425; *Louisville v. Robinson*, 4 Bush, 507. But see *Illinois v. Jewell*, 46 Ill. 99.

⁶ *Coon v. The Syracuse, &c.*, 1 Seld. 492.

⁷ *Degg v. Midland, &c.*, 3 Jur. N. S. 395.

(a) A railroad is liable for injuries resulting to a subordinate employee, engaged in conducting the cars, from the

gross negligence of the engineer. *Louisville v. Collins*, 2 Duv. 114.

senger-trains and gravel-trains, at such times and places along the road as directed; and, being ordered to go to F. and take charge of a gravel-train, the next day, at that place, took passage on the train for F., but passed by F. to T., and on the morning of the next day returned, by the same train towards F., to take charge of the gravel-train as directed. Before arriving at F., by the carelessness of the servants operating the passenger-train, he was thrown from the car and injured, and brought his action against the company for damages. Held, the plaintiff, although having no duties to perform on the passenger-train, was to be regarded as an employee of the defendant; and his relation of fellow-servant to the employees operating the train entitled the plaintiff only to the exercise on their part of ordinary care, and not that extraordinary care due to a common passenger.¹ So a carpenter, employed by the day by a railroad to work on the line, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him while being so carried, by the negligence of the engineer, or by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles.² So A, the plaintiff's intestate, an engine-driver on the defendants' railroad, was killed by the explosion of the locomotive, which occurred in consequence of the neglect of B, the defendants' master mechanic, to keep the locomotive in repair. The duty of B was to superintend and direct the repairs of all the locomotives. The directors furnished their road in the first instance with suitable machinery and faithful and competent employees, and they were ignorant of any defect in the locomotive. Held, the defendants were not liable.³ And, in general, to render a master liable for an injury to one employee through the negligence of another, the latter must be placed by the master in such a position of trust and authority as to be fairly his representative.⁴ The fact that he is a servant of superior authority, whose lawful orders the other is bound to obey, is not enough.⁵ Thus an "underlooker" in a mine, whose duty it is to examine the roof, and prop it up, if dangerous, is a fellow-laborer with a workman in a mine; and the

¹ *Manville v. Cleveland, &c.*, 11 Ohio, N. S. 417.

² *Seaver v. Boston, &c.*, 14 Gray, 466.
See 10 Allen, 233; p. 461.

³ *Hurd v. Vermont, &c.*, 32 Vt. 473.

⁴ *Murphy v. Smith*, 19 C. B. N. S. 361.

⁵ *Feltham v. England*, L. R. 2 Q. B.

latter can maintain no action against the owner for injury occasioned by the neglect of the underlooker to prop up the roof, if the owner has not personally interfered or had any knowledge of the dangerous state of the mine.¹ So where two servants are employed upon the same work, and one of them without authority from his employer directs the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided, and he complies and thereby receives an injury; the employer is not liable.² And the rule was held applicable, where the plaintiff was engaged, with other workmen, in moving a heavy machine from one room into another, by means of trucks, one of the wheels of which broke through the floor, and injured him.³ Fellow-servants, within the meaning of this rule, are those who are engaged under the same master in promoting one common object. Each is but a servant for the purpose for which he is employed.⁴ So where an employee, in entering the building of his employer, in the ordinary course of his business, falls through an open hatchway and is killed, and the evidence given tends only to the conclusions, that, whenever the hatchway was rightfully opened, it was by the order of the defendant or of a particular agent, and that in the latter case such agent always stood by it, when it was open, to guard against accidents, and that on the occasion in question it was opened without the knowledge or permission of such particular agent or of the defendant, by the unauthorized act of a fellow-servant of the deceased; the conclusion of law is, that the deceased, if himself without fault or negligence, was killed not by the neglect or default of his employer, but of his fellow-servant. A verdict for the plaintiff, upon this evidence, will be set aside as contrary to evidence.⁵ Nor is it material that the plaintiff is under age.⁶ Nor, as already suggested, that both servants were not in the same employment.⁷ It is sufficient that both servants are engaged in *the same general business*; that, though the employments of the agents are distinct, both are necessary in the prosecution of a common enterprise.⁸ And it is held immaterial, that the injured party has a position inferior to that of the other.⁹ And the general rule more especially applies,

¹ Hall v. Johnson, 3 Hurl. & Colt. 589.

² Felch v. Allen, 98 Mass. 572.

³ Cooper v. Hamilton, 14 Allen, 193.

⁴ Ohio v. Hammersley, 28 Ind. 371.

⁵ Karl v. Maillard, 3 Bosw. 591.

⁶ King v. Boston, &c., 9 Cush. 112;

Brown v. Maxwell, 6 Hill, 592. See Ranch v. Lloyd, 31 Penn. 358; Norris v. Litchfield, 35 N. H. 371.

⁷ Ryan v. Cumberland, &c., 23 Penn. 384; Gillshannon v. Stony Brook, &c., 10 Cush. 228.

⁸ Coon v. The Syracuse, &c., 1 Seld.

492; Carl v. Maillard, 3 Bosw. 591.

⁹ Hurd v. Vermont, &c., 32 Vt. 473. See p. 470.

if the plaintiff himself has also been guilty of negligence in connection with the act complained of. Thus, where several servants were engaged in the same work, and one of them was injured by an act of negligence in which all participated, the master being absent at the time; held, in a suit brought against the master for the injury, that the servant could not recover, though the act complained of was done under the superintendence of a servant appointed by the master.¹ The rule also applies to a person who is injured, whilst voluntarily assisting the servants in their work. Therefore, where the servants of the defendants, a railway company, were turning a truck on a turn-table, and A, not in the employment of the defendants, volunteered to assist them, and, whilst so engaged, other servants of the defendants negligently propelled a steam-engine, and thereby caused the death of A, and the servants were persons of competent skill, and the defendants did not authorize the negligence; held, the defendants were not liable to an action by the personal representative of A.²

§ 25 *a*. Various exceptions, however, have been engrafted upon the general rule above stated. (*a*) Thus it is held, that, upon the ground of the public obligation resting upon a railroad corporation, to keep their road safe for all legally upon it, not because of the contract between the companies, to which he was not privy; the engineer of a railroad company, conducting a train over a section of road belonging to another corporation, in accordance with a mutual contract so to do, may recover damages against that corporation, for injuries sustained by reason of the negligence of one of its servants.³ So the rule, that the principal is not liable to one agent, for an injury occasioned by the negligence or mis-

¹ *Brown v. Maxwell*, 6 Hill, 592.

³ *Sawyer v. Rutland, &c.*, 1 Will. 370.

² *Degg v. Midland, &c.*, 40 Eng. L. & Eq. 376; 3 Jur. N. S. 395.

(*a*) In a late case in Wisconsin, it is held, that the employer is liable to one servant for injuries caused by the carelessness of another. The servant assumes the risks necessarily incident to the employment, but the employer must see to it that all his servants are careful and vigilant. And it is immaterial, whether the negligent person was a co-servant of the injured person, or a servant in another department, or a superintendent. Thus an express agent, lawfully travelling on the road, in care of express freight, was hired by the superintendent to act as

brakeman during one trip, and thrown from the cars and injured, by the negligence of the engineer. In an action against the road, held, he was a servant of the corporation. *Chamberlain v. Milwaukee, &c.*, 11 Wis. 238. See *Frost v. Union*, 11 Am. Law Reg. 101. It is held in a recent English case, that the rule referred to in the text does not exempt from liability to action a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence. *Ashworth v. Stanwix*, 3 Ell. & Ell. 701.

conduct of another, was held not to apply to *slaves*. Thus where a slave, hired as carpenter on board a steamboat, was killed by the misconduct of the master, the owner of the steamboat was held liable.¹ So the plaintiff, a servant of J. & Co., who were employed by the defendants to carry the cotton from a warehouse, was receiving the cotton into his lorry, when through the negligence of the defendants' porters a bale fell upon him. Held, the plaintiff and the porters were not so in the same employ, or engaged in a common object, as to take away the plaintiff's right of action.²

§ 25 *b*. Another exception to the rule has been the subject of somewhat conflicting views in late English cases. Thus where the plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defendant; it was held a wrong instruction, that, if the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or *if the person employed by the defendant to erect it was incompetent*, the plaintiff was entitled to recover.³ But, in this case, the qualification of the general rule is recognized, and has been adopted in many other cases, that a master is not held responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant, while they are acting in one common service; *provided the latter is a person of ordinary skill and care, and the master uses reasonable care in his selection, and furnishes him suitable means to perform the service*. Thus the servant of a railway company cannot recover from them for an injury caused by the falling of a bridge, unless the company was negligent in employing incompetent persons to build the bridge, or was otherwise at fault in respect to defects on the bridge.⁴ So the defendants, being the contractors for large works, employed M. to do part of the works by the piece, for a certain sum payable by monthly instalments, according to the work done, the defendants finding the tools. W., who was then in the defendants' service, was taken by M. from his work, and put to assist in the piece-work at weekly wages, but, in accordance with the general regulations at the defendants' works, W. was paid his wages

¹ Scudder v. Woodbridge, 1 Kelly, 195.

² Abraham v. Reynolds, 5 Hurl. & Nor. 143.

³ Tarrant v. Webb, 37 Eng. L. & Eq. 281.

⁴ M'Dermott v. Pacific, &c., 30 Mis. 115; Caldwell v. Brown, 53 Penn. 453;

M'Mahon v. Davidson, 12 Minn. 357;

Perry v. Ricketts, 35 Ill. 234; Moss v. Pacific, 49 Mis. 167; Chicago v. Harney, 28 Ind. 28; Harper v. Indianapolis, 47 Mis. 567; Paulmier v. Erie, 34 N. J. L. 151.

weekly by the defendants with their other workmen. M., who, before the contract piece-work, had also been in the defendants' employment, at weekly wages, drew from the defendants money in that character, the whole being charged against him, and deducted from the amount of the instalments when payable. W. having been killed while at work on the piece-work, by the negligence of the defendants' servants; held, that W. and M. were both the servants of the defendants, and therefore that the administratrix of W. could not maintain an action against the defendants for the negligence of the defendants' other servants, *who were reasonably fit and competent for the service in which they were employed*.¹ And the officer, having charge of that department of the business in which the injury occurred, is the party from whom the law exacts suitable care in this respect. Hence evidence is admissible, that he was ignorant of the carelessness of the employee by whose fault the accident was caused.² A general reputation of unfitness renders the employer liable, though such reputation was unknown to him.³ And a railroad, for example, is liable after the incompetency is made known to its officers, or becomes so manifest, that its officers, using due care, would have known it.⁴ A carpenter, employed by a railroad corporation to repair its cars, and conveyed by it to and from his place of work free of charge, cannot recover damages against the corporation for an injury sustained while upon such journey caused by the negligence of one of the company's switchmen, provided due care has been exercised by the company in employing him; but where it appears that he was an habitual drunkard, and that the company had notice thereof, and that the accident was caused by his drunkenness, it is liable.⁵

§ 25 *c.* And the general rule does not apply to an injury, caused in part by the negligence of the employer. Thus an engineman, in the employ of railroad A, but running their train, by agreement of the companies, on railroad B, was killed, without negligence on his part, but owing to the negligence of a switch-tender employed by railroad B (the defendants), and the insufficiency of their switch. It appeared that an improved form of switch was known to the defendants, and they had it in their power to apply

¹ M'Dermott v. Pacific, &c., 30 Mis. 115; Wiggett v. Fox, 36 Eng. L. & Eq. 486; 6 Hill, 592; Fox v. Sandford, 4 Sneed, 36; Frazier v. Penn. R. R., 38 Penn. 104; 30 Mis. 115; Ponton v. Wilmington, &c., 6 Jones, 245; Illinois, &c. v. Cox, 21 Ill. 20; Michigan, &c. v.

Leahey, 10 Mich. 193; Sullivan v. Mississippi, &c., 11 Iowa, 421.

² Frazier v. Pennsylvania, &c., 38 Penn. 104.

³ Lalor v. Chicago, 52 Ill. 401.

⁴ Gilman v. Eastern, 13 Allen, 433.

⁵ Gilman v. Eastern, 10 Allen, 233.

it, which would reduce materially the risk of accident, and that the neglect to employ this improvement caused the accident: Held, the defendants were liable to the administratrix.¹ (a)

§ 25 *d*. And it has been doubted whether the rule applies, where the employment of the servant who is injured is wholly distinct from that of the servant by whose negligence the injury was occasioned.² Thus it was held, though this decision appears to have been overruled (see § 25), not to apply to the case of a day laborer employed by a railroad company from day to day, who was injured in returning from work on the company's cars, through an accident occasioned by the misconduct of the engine-driver.³ So the plaintiff was in the employ of a railroad company, his business being, with other laborers, to ballast part of their road, excavating gravel from certain banks, loading it in gravel-cars, and then distributing it along the track. Some of the workmen, among them the plaintiff, lodged in a village two miles from the gravel banks, and, by agreement with the company, were to be conveyed to the village for meals and lodging, and then back to the banks. While so employed, the plaintiff, during his conveyance on a gravel-car to the banks, to work, by the gross negligence of the engineer of the train he was riding on, was injured. Held, the company was liable.⁴ And where a contractor, engaged in repairing a bridge upon a railroad for the company, employs men to work thereon by the day; they are his servants, not those of the company; and between them and the company there is no privity. If a man thus employed receives an injury from a passing train while at work upon the bridge, caused by the negligence of the company's servants or agents, in charge of the train, without any fault or negligence on his part; he may maintain an action against the company.⁵ So in an action to recover for in-

¹ *Smith v. New York, &c.*, 6 Duer, 225; 10 Mich. 198; 11 Iowa, 421.

² *Russell v. Hudson, &c.*, 5 Duer, 89. See § 25.

³ *Ibid*.

⁴ *Fitzpatrick v. New Albany, &c.*, 7 Ind. 436. But see *Columbus v. Arnold*, 81 Ind. 174.

⁵ *Young v. New York, &c.*, 30 Barb. 229.

(a) But, on the other hand, a party who was himself in fault, cannot recover; as, for example, a brakenian, who had knowledge of the habitual carelessness of the conductor; although the company also knew it. 38 Penn. 104; *Louisville v. Robinson*, 4 Bush, 507.

So in the case of one having notice of the defect which caused the injury. *Kroy v. Chicago*, 32 Iowa, 357.

So where a person injured upon a railroad is a minor, in the employ of the company, and the injury is caused by his own negligence or that of a fellow-servant engaged in the same general employment, an action cannot be maintained by his father, unless the company were negligent in hiring the co-servant. *Chicago v. Harney*, 28 Ind. 28.

juries received through a defective highway; it appeared that the plaintiff was on duty July 4, 1858, in the evening, as a special police-officer for that night only. While in First Street, he fell into a hole in the sidewalk, spraining and partly dislocating his ankle-joint, which resulted in confining him to his house for some four weeks, and keeping him lame thereafter for some months. The defendant contended at the trial, that he was not liable, because the plaintiff, at the time, was in the employ of the city, and the accident happened through the fault and negligence of other employees of the city in not repairing the street. Held, this principle of law did not apply to the case.¹ (a)

§ 26. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong (as to take personal property, which, although claimed

¹ Kimball v. Boston, 1 Allen, 417.

(a) Recent cases upon the subject of liability for fellow-servants are as follows:—

The rule, that a servant cannot recover of the master for an injury inflicted by a fellow-servant, is not applicable, where a servant of tenants has been injured by the negligence of a servant of the owner, employed in the same room to manage an engine working an elevator, upon which the injury occurred. *Stewart v. Harvard*, 12 Allen, 58.

Nor where the servant injured was not at the time acting in the service of the master. *Washburn v. Nashville*, 3 Head, 638.

Nor where a master himself takes part in the servant's work, and whilst so doing injures the servant through negligence. And if the master is a member of a partnership, by which the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him. *Ashworth v. Stanwix*, 3 Ell. & Ell. 701.

In an action by an employee of a steamboat for injuries received through the negligence of employees of a railroad: held, that the employees were not servants of a common master, it appearing that the companies were distinct, and that they had an arrangement by which one was to carry passengers to B, and the other to take them there and carry them on; that the prices were distinct, but that each sold tickets over the route of the other, each receiving a certain portion of the through fares and freight; that the steamboat and railroad

connected as to time, but that there was no actual connection; that they received and delivered mails to and from one another, but had no other connection with them, except on their own route. *Carroll v. Minnesota*, 13 Minn. 30.

A railroad is liable for injuries to an employee, arising from the negligence of any of that class of superior agents who act for and in place of the corporation, such as officers, directors, or other managing agents, and who, as such, within the trusts confided to them, control and direct the operations of the corporation, and employ its inferior servants and agents. *Warner v. Erie*, 49 Barb. 558.

The plaintiff was a porter at a station of the A Railway Company. The defendant railway company also used the station; and their servants, while there, were subject to the rules of the A company, and to the control of their station-master. The plaintiff, while at his usual employment, was injured by the negligence of the defendant's engine-driver. Held, that the plaintiff and the engine-driver were not fellow-servants. *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30.

The plaintiff, a deck-hand on one of two river steamers, which were near each other, was injured by the explosion of the boiler of the other. In an action against one who was a partner in running both boats; held, he could not make the defence, that the injury was caused by the negligence of a fellow-servant of the plaintiff. *Conolly v. Davidson*, 15 Minn. 519.

adversely by another, he has reasonable ground to believe belongs to his principal), the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency. And, on such promise, case and assumpsit are equally maintainable; but, in either action, the declaration must allege a breach.¹ Or, as is held in a recent case, there is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, when the act would have been lawful in respect to both, if the principal really had the authority which he claimed.² Thus an agent, who, acting under the direction of his principal, cuts down timber on the land of a third person, may recover of his principal the amount of a judgment recovered against him for the trespass by the owner of the timber cut, his principal having received and disposed of the timber.³ If the declaration is in case, to recover indemnity from the principal, for damages recovered in trespass against the agent by the true owner of the property taken; it must negative the existence of any knowledge on the part of the agent at the time of the taking, that he was committing a trespass, although the *onus* of proving such knowledge may be on the principal.⁴

§ 26 *a*. With regard to the right of the master to *chastise* his servant, it has been held that a master has no right to flog a choir-boy of a cathedral for singing at private parties without his leave.⁵

§ 26 *b*. In reference to the *dismissal* of a servant, if a person, hired on an annual service, as *clerk*, claim to be *partner*, although in a respectful manner and *bonâ fide*, he may be dismissed without notice.⁶ So the purchase by the servant, without the master's knowledge, of a large quantity of an article used by the master in his business, which property was invoiced and delivered to one A, who allowed the servant to have such part thereof as was needed in the master's business; with a denial of the purchase, when first charged with it by the master; together with the further fact, that the vendor made claim upon the master for part of the price: is sufficient to support a verdict of dismission for justifiable cause.⁷

¹ Moore v. Appleton, 26 Ala. 633; Law Reg., May, 1863, p. 440, N. Y.

² Howe v. Buffalo, 37 N. Y. 297.

³ Drummond v. Humphreys, 39 Me. 347.

⁴ Moore v. Appleton, 26 Ala. 633.

⁵ Newman v. Bennett, 2 Chit. R. 195.

⁶ Amor v. Fearon, 1 Per. & Dav. 398. See Lane v. Phillips, 6 Jones, 455; Coffin v. Landis, 46 Penn. 426.

⁷ Horton v. McMurtry, 5 Hurl. & Nor. 667.

§ 26 *c.* M. was employed by a railroad to purchase wood and lumber. The owner of a tract of timber land offered M. a commission if he would procure the sale of it to the railroad. M. informed the superintendent that the land could be bought, stating the price, and that he could get a commission on the sale. The superintendent communicated to the officers only that the land was for sale, and shortly after one of its directors consulted with M. about the purchase, and examined the land in company with him; M. advising its purchase, but not communicating to the director that he was offered a commission. Under this advice the land was purchased, and, after payment, M. received the commission. It did not appear that the superintendent was engaged in the purchase of lands, wood, or lumber, for the corporation, or that he had authority to give assent for M. to speculate out of transactions of the corporation; but the directors were the persons to decide upon the purchase of lands for the company, and this M. knew. Held, that this constituted a breach of M.'s contract of employment, and justified his discharge; and that the railroad were entitled to the amount of the commission.¹

§ 26 *d.* Where a party has entered into a contract to serve another for a year, and is wrongfully dismissed by his employer before the expiration of his time of service, he may bring an action immediately for any special injury which he may have sustained by such dismissal.²

§ 26 *e.* Where an *apprentice* is not a party to the indenture of apprenticeship, his remedy for non-performance by the master is by an action on the case.³

§ 27. In reference to the question, whether *the right of action for an injury committed by a third person* is in the master or the servant; the general rule is laid down, that actions for torts springing from contract, which consist in a mere omission of a contract duty, must be brought by the party injured, and cannot be sustained by the master on the part of his servant.⁴ It is held that an action on the case lies in the name of the principal, for a false representation made to the agent, whether he be a factor, commission merchant, or clerk.⁵ So where an agent, without disclosing the name of his principal, makes a contract with a common carrier to transport the property of the principal, the latter may

¹ Morrison v. Ogdensburg, 52 Barb. 173.

² Rogers v. Parham, 8 Geo. 190.

³ McGunigal v. Mong, 5 Barr, 269.

⁴ Passenger v. Stutler, 54 Penn. 375.

⁵ Raymond v. Howland, 12 Wend. 176; Tuckwell v. Lambert, 5 Cush. 23.

maintain an action in his own name against the carrier, to recover damages for the loss of the property.¹ So in a suit for fraud in the sale of real estate, the fraudulent representations were made to an agent, who assigned his interest in the cause of action to his principal. Held, the assignment was of no legal effect, as the cause of action was in the principal without an assignment.² So a factor, or his assignees and representatives, are trustees of the principal, so long as any article originally bailed to them, or the proceeds thereof in money or other form, remain in their hands; and the principal may recover such article or money, on the insolvency of the holders, if he can still trace it to them; unless they should pay it away, in their representative character, before notice of the claim.³

§ 27 *a*. But a servant, finding a chattel in the house of his master, who voluntarily assumes the custody of it for the servant's benefit, may maintain an action of trover against a wrong-doer who converts it.⁴ So a servant may maintain an action of tort for an injury to himself, although an action for breach of contract connected with such injury must have been brought by the master. Thus a servant, travelling with his master on a railway, may have an action in his own name against the company for the loss of his luggage, although the master took and paid for his ticket. The liability of the company is independent of the contract.⁵ So one railroad is liable to the servant of another for an injury caused by the fault of the former.⁶ And master and servant may also bring separate and successive actions against the same party for an injury to the servant. Thus, in case of the battery of a servant. And recovery in one action may not be pleaded in bar of the other.⁷

§ 28. This leads to the further remark, that an action is held to lie for the master against a third person, for *an injury done to the servant*, whereby the master is deprived of his service. Thus the hiring of a person of full age, for wages by the year, creates the relation of master and servant, and enables the employer to maintain *case* against one who imprisons the person employed, for the loss of his services.⁸ And in order to maintain such action, it is not necessary that the servant be hired at any certain wages or

¹ *Elkins v. Boston, &c.*, 19 N. H. 337.

² *Cramer v. Wright*, 15 Ind. 278.

³ *Fahnestock v. Bailey*, 3 Met. (Ky.) 48.

⁴ *Mathews v. Harsell*, 1 E. D. Smith, 393.

⁵ *Marshall v. York, &c.*, 7 Eng. L. & Eq. 519.

⁶ *Smith v. New York, &c.*, 19 N. Y. (5 Smith) 127.

⁷ *Savill v. Kirby*, 10 Mod. 385.

⁸ *Woodward v. Washburn*, 3 Denio, 369; *White v. Smith*, 12 Rich. 595.

salary.¹ So it was held that the plaintiffs might sue the defendant in case, for loss of services of their traveller, by an accidental collision with the defendant; that the damage was not too remote, though trespass would have been the proper remedy had the servant been the plaintiff.² And, in such action, the *damage* alone is not the cause of action, but the illegal act and the damage together. Hence, in an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for *prospective* damage. He could not bring a fresh action as often as fresh damage resulted.³ So, in an action of trespass, for forcibly invading a plantation, carrying off some of the slaves, and frightening all the others away, the plaintiff might give in evidence the consequential damages necessarily resulting from the loss of hands, including the loss of cord-wood floated off by the rising of the river, and the injury to the corn-crop by the neighbor's cattle breaking into the corn-field.⁴ So for loss of service a master can recover, though pregnancy did not follow seduction, and venereal disease did.⁵ (See chap. 43.) But it is elsewhere held, that an action does not lie for the loss of service of a servant, caused by a collision.⁶ Nor, against a railway, for an injury sustained through their negligence by a servant, whereby the master lost the benefit of his services, — the contract, out of which arose the duty to carry safely, being a contract between the company and the servant.⁷ And where two members of a patrol company, while on duty, hailed a slave at night, who was riding into a village; and the slave attempted to escape, whereupon the patrol fired on him, and inflicted wounds of which he died: held, the patrol were not liable to the master for damages.⁸ (a)

§ 29. An action lies for enticing away a servant if then at work.⁹ Thus the master of an apprentice may recover the value of his services from one who, during his term of service, seduces him away and employs him.¹⁰ An action also lies, for *seducing a journeyman*

¹ *Martinez v. Gerber*, 3 Scott, N. 386.

² *Martinez v. Gerber*, *ib.*; 3 Man. & Gr. 88.

³ *Hodsoll v. Stallebras*, 3 Per. & Dav. 200; 11 Ad. & Ell. 301.

⁴ 13 How. 447.

⁵ *White v. Nellis*, 31 Barb. 279.

⁶ *Martinez v. Gerber*, 3 Scott, N. 386.

⁷ *Alton v. Midland*, 19 C. B. N. S. 213.

⁸ *Duperrier v. Dautrive*, 12 La. Ann. 664.

⁹ *Walker v. Cronin*, 107 Mass. 555; *Salter v. Howard*, 43 Geo. 601; *Peter v. Bloeker*, *ib.* 331.

¹⁰ *Stout v. Woody*, 63 N. C. 37.

(a) As to the right of action for injuries to slaves, more especially in reference to the *directness* or *remoteness* of the cause of injury; see *Wright v. Gray*,

2 Bay, 464; *McDaniel v. Emanuel*, 2 Rich. 455; *Duncan v. S. C., &c.*, *ib.* 613; *Sedgw. on Damages* (3d ed.) 92, n. w.

to leave his employer.¹ So the rule is not confined to *menial* servants, or to such as fall within *the Statute of Laborers*, but extends to all cases, where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service, for a given time, under the direction of an employer, who is injured by the wrongful act; and wherever there is at the time of the persuading a binding contract, whether the service be then actually subsisting or not. Thus a declaration by the lessee of a theatre charged, that one J. W. had contracted with the plaintiff to sing, during a certain term, at his theatre, and not elsewhere, without the plaintiff's consent, and that the defendant had during the term maliciously enticed and procured J. W. to depart from her said contract, against the will of the plaintiff, whereby J. W. refused to sing for the plaintiff at his theatre during the whole of the term. Also, that J. W. had been hired by the plaintiff as, and was, his dramatic artiste, for a certain term, and that the defendant had maliciously enticed and procured her to depart from her said employment during the said term. All the counts alleged special damage. On demurrer, held, that the action was maintainable at common law.² So the defendants invited the plaintiff's servants to dinner, and induced them to leave him; whereby the plaintiff lost the profits of sales of pianos for two years. Held, the plaintiff might recover damages for such loss, although the servants were not hired for any specific time, but worked by the piece.³ So an action will lie, for *continuing* to employ the servant or apprentice of another after notice, though the employer did not procure the servant to leave his master, or know when he employed him that he was the servant of another.⁴ So it is not necessary to show, that an apprentice actually ran away from, or rebelled against, his master, to support an action under an act, which provides for a suit against any one who "counsels, entices, and persuades" him so to do.⁵

§ 30. But, to maintain an action for enticing away a servant, there must be proof of a service owing to the plaintiff, by virtue of an agreement of the servant or one authorized to bind him.⁶ The rule is held not to apply to a superintendent or *boss*.⁷ And though an action on the case lies for seducing and harboring the servant

¹ Hart v. Aldridge, Cowp. 54, cited in 6 Mod. 101.

² Lumley v. Gye, 20 Eng. L. & Eq. 168.

³ Gunter v. Astor, 4 Moo. 12.

⁴ Blake v. Lanyon, 6 T. R. 221; Ferrell v. Boykin, Phill. (N. C.) 9.

⁵ Holliday v. Gamble, 18 Ill. 35.

⁶ Campbell v. Cooper, 34 N. H. 49.

⁷ Bryan v. State, 4 Geo. 328.

of the plaintiff, notwithstanding *a penalty* given by statute, which is a cumulative remedy; ¹ yet it has been held that no action lies for seducing a servant from his master, if the servant has paid the penalties stipulated by his articles for leaving him. As where the master had recovered the penalty in an action of debt brought by him against the servant before he commenced the present action; although the debt and costs were not actually paid to him till after the commencement, though before the trial of it.² In general, the measure of damages is the value of the service during the time complained of; but is held, under special circumstances, to be the full value of the servant.³

§ 31. An action for enticing and harboring an apprentice cannot be maintained, without proof of the defendant's knowledge of that relation.⁴ So in an action on the case for employing a runaway slave, alleging notice that the negro was the runaway slave of the plaintiff; he must have proved the *scienter*, unless from the circumstances the law would presume it.⁵ (*a*) And an action on the case, brought by a father for the enticing away of his son from his service, is not supported by proof that the defendant, knowing that the son had left his father's service without his father's consent, induced him to enter into the service of the defendant, and detained him when he wished to return.⁶

¹ Scidmore v. Smith, 13 Johns. 322.

² Bird v. Randall, 3 Burr. 1345; 1 W. Bl. 387. See Vooght v. Winch, 2 B. & Ad. 662; Gray v. Gillilan, 15 Ill. 453.

³ Dubois v. Allen, Anth. N. P. 94.

⁴ Stewart v. Simpson, 1 Wend. 376.

⁵ Bell v. Lakin, 1 M'Mullan, 364.

⁶ Butterfield v. Ashley, 2 Gray, 254.

(*a*) The charge of enticing away from a plantation freedmen laborers is not an offence. State v. Sypher, 19 La. Ann. 71.

CHAPTER XLI.

PRINCIPAL AND AGENT. — ATTORNEYS, ETC., AT LAW.

1. General liability of an attorney.
4. In reference to *suits*.
5. The collection, &c., of money.
6. *Securities and titles*.

7. Negligence, whether a defence to a suit for fees.
8. Liability to parties wrongfully sued.

§ 1. A PECULIAR class of *agents* consists of *attorneys-at-law*, whose rights, duties, and liabilities may therefore properly be considered in the present connection.

§ 2. It is held, that the highest degree of *fairness and good faith* is expected and exacted of attorneys in their dealings with clients;¹ (a) and that an attorney is responsible for *ordinary skill*,

¹ Jennings v. McConnel, 17 Ill. 148. See Mauro v. Buffington, 26 Mis. 184; Rice v. Commonwealth, 18 B. Monr. 472; Brown v. Brown, 4 Ind. 627; Zug

v. Laughlin, 23 Ind. 170; Juday v. Trustees, &c., Ib. 272; Bougher v. Schohey, Ib. 583.

(a) Courts of chancery have jurisdiction, in all cases between client and attorney, in which the latter has taken advantage of his position to defraud the former. And the burden is held to be on the attorney, to show the fairness of their transactions. Jennings v. McConnel, 17 Ill. 148; Kisling v. Shaw, 33 Cal. 425. (See pp. 479, n., 480.)

There are no transactions which courts of equity will scrutinize with more jealousy than dealings between attorneys and their clients, especially where the latter are persons of inferior capacity and inexperienced in business. Mills v. Mills, 26 Conn. 213.

In reference to the general rule, that an attorney cannot avail himself of any advantages derived from a purchase of the subject of litigation or a purchase for his client; see West v. Raymond, 21 Ind. 305; Lashley v. Cassell, 23 Ind. 600; Eshleman v. Lewis, 49 Penn. 410; Annan v. Stout, 42 Penn. 114; Adams v. Fox, 40 Barb. 442; Learned v. Haley, 34 Cal. 608; 40 N. Y. 577; Leach v. Fowler, 22 Ark. 143; Zeigler v. Hughes, 55 Ill. 288; Warren v. Hawkins, 49 Mis. 137; Wheeler v. Willard, 44 Vt. 640; Hamsher v. Kline, 57 Penn. 397. As to the jurisdiction of

a court over its attorneys, see Bradley v. Fisher, 13 Wall. 335; Dickens', 67 Penn. 169; People v. Ford, 54 Ill. 520; Walker v. Com., 8 Bush, 86; Kane v. Haywood, 66 N. C. 1.

The Supreme Court (of N. Y.) is bound to cause charges against an attorney to be preferred, whenever satisfied, from what has occurred in its presence or from other satisfactory proof, that the ends of justice call for such proceedings. Percy, 36 N. Y. 651.

An order to show cause, founded upon the proper papers presented, served with the papers upon the attorney, is the approved mode of proceeding. Ibid.

The court has power to strike his name from the roll. Ibid.

A good moral character being a prerequisite to holding the office of attorney, the ceasing to possess such character is good cause for removal. Ibid.

When an attorney is charged with malpractice, the case should be free from doubt, not only as to the acts, but also as to his motive, before his name should be stricken from the rolls. People v. Harvey, 41 Ill. 277.

Where a statute prescribes causes for which an attorney may be disbarred, the

diligence, and care in the exercise of his profession ;¹ and is liable for *ordinary neglect* ; and the skill required has reference to the character of the business which he undertakes to do.² (a) It is said : " It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases for which he is undoubt-

¹ Holmes v. Peck, 1 R. I. 242.

² Cox v. Sullivan, 7 Geo. 144.

courts are restricted to these causes. Smith, 28 Ind. 47.

Without proof of fraudulent misappropriation, by an attorney who has become bankrupt, after failing to pay over a client's money, the court will not strike him off the rolls therefor. Sparks, 17 C. B. N. S. 725.

The conversation of an attorney in a public place, about the merits of a case in which he was employed, in presence of the jurors who were trying it, though not sufficient ground to set aside a verdict, might justify the court in striking the name of the attorney from the roll. Turner v. St. John, 3 Cold. 376.

Upon the return of a rule against an attorney, to show why he should not be disbarred for contempt before the criminal court ; no removal can be had on the ground that such contempt was a gross misbehavior in office generally ; the offenses are distinct. Bradley, 7 Wall. 364.

A rule to show cause, why an attorney's name should not be stricken from the rolls, was made upon him, before any foundation was laid ; but A subsequently made oath that he believed the matters set forth in the rule were true. Held, irregular. State v. Kirk, 12 Flor. 278.

The proceedings were also held irregular, because it did not appear that the rule was served, or that service was waived, or that the rule was made returnable at any certain day. Ibid.

A suit, brought by an attorney not qualified to practise, should not be dismissed therefor, but the attorney should himself suffer the punishment imposed by law. Rader v. Snyder, 3 W. Va. 414.

A court may order costs to be paid by counsel, in cases of gross negligence, under the general power to punish for contempt. But where a suit was begun February term, 1867, by the proccessioner, under c. 88, (N. C.) Rev. Code, and the

defendants voluntarily intervened, and, after the suit was constituted in court by the return of the proccessioner, the counsel for the plaintiffs at the August term, 1867, moved the confirmation of the report, which was confirmed ; and the defendants appealed, and the case was continued from term to term, and then dismissed on motion of the defendant for defect of parties, and for the neglect in amending : held, no ground for taxing the costs against the counsel for the plaintiffs for negligence amounting to a contempt. Robbins, 63 N. C. 309.

(a) An attorney or solicitor, who, on payment of his bill delivers up papers that have been intrusted to him, is bound to deliver them up in a reasonable state of arrangement, so that the party to whom they are delivered may not be put to unreasonable trouble in sorting them. North-western, &c. v. Sharp, 28 Eng. L. & Eq. 555.

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it. Reeve v. Palmer, 5 C. B. N. S. 84.

The client is not bound to any diligence, unless stipulated for. Cox v. Sullivan, 7 Geo. 144.

It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the matters placed in his hands, and he will be presumed to have discharged his duty. Burci v. Red Bluff Hotel Co., 31 Cal. 160. See p. 478, u.

Where a person acting as attorney, agent, or confidential adviser of another receives a gift from the latter, the transaction will be scrutinized closely, the presumption being against its propriety, but this presumption may be overcome by evidence that the transaction was voluntary and fair. Nesbit v. Lockman, 34 N. Y. 167.

edly responsible.”¹ And, with regard to the precise measure of an attorney’s liability ; on the one hand it is held to be a fair presumption, that an attorney acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred.² (See p. 478, n.) It is said : “ Attorneys ought to be protected when they act to the best of their skill and knowledge ; and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt, which he was employed to recover for his client, from the person who stands indebted to him.”³ So it is held, that an error of judgment in an attorney, upon an open and controverted point of law, is not such gross ignorance, as will make him liable to his client for damages resulting from the error ;⁴ that an attorney is liable only for *gross negligence* or *gross ignorance* ; and is entitled to the benefit of the rule, that every one shall be presumed to have discharged his legal and moral obligations, until the contrary shall be made to appear. And, when made to appear, the extent of the damages must also be affirmatively shown. Thus, where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. Unless the latter be shown, he would be liable only for nominal damages ; and under no circumstances would he be liable for more than the actual damages sustained by his negligence.⁵ (a) (See § 6.)

¹ Per Tindal, C. J., *Godefroy v. Dalton*, 6 Bing. 460, 467. See *Stevens v. Walker*, 55 Ill. 151 ; *Reilly v. Kavanaugh*, 29 Ind. 435 ; *O’Barr v. Alexander*, 37 Geo. 195.

² *Holmes v. Peck*, 1 R. I. 242.

³ Per Lord Mansfield, *Pitt v. Yalden*, 4 Burr. 2061 ; *Harter v. Morris*, 18 Ohio St. 492. See *Godefroy v. Dalton*, 6 Bing. 467.

⁴ *Morrill v. Graham*, 27 Tex. 646.

⁵ *Pennington v. Yell*, 6 Eng. 212.

(a) An attorney, who had drawn a deed for a client, and a somewhat similar deed, in which the plaintiff, not his client, was a party, but in the same transaction, erroneously answered a casual inquiry of the latter as to the effect of his deed (forgetting the difference between the deeds), whereby the latter, acting on the answer, was damaged. Held, the attorney was not liable. *Fish v. Kelly*, 17 C. B. N. S. 194.

In a very recent case, it appeared that the defendant, an attorney, had conducted the plaintiff’s cause honestly, to the best of his knowledge and ability, but that he had presented a motion for a new trial without a *certified statement*, in conse-

quence of which the appeal of the plaintiff in the former suit was dismissed. The lower court held, that the plaintiff had suffered no injury from the dismissal, because, as the law then stood, he could have taken nothing by his appeal ; although under subsequent decisions of the same term he might have appealed effectually. Held, in the court above, the facts being ascertained, the question of negligence or want of skill was one of law, and, the court below having decided in favor of the defendant, a new trial was ordered. *Gambert v. Hart*, (California) Am. Law Rev., vol. 7, No. 3, p. 561, April, 1873.

§ 3. But on the other hand it has been held, that, under some circumstances, the law throws upon an attorney regularly employed to conduct a cause, the burden of proving that his client has not been injured by his negligence in that behalf. Thus, where the defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the plaintiff had retained him to defend; the negligence being proved, held, it was for the attorney to defend himself by showing that the plaintiff had no defence in that action, and not for the plaintiff to show that he had a good defence, and so had been damaged by the judgment by default.¹ What is reasonable care and skill, is a question for the jury. The judge is not bound to define it.² The testimony of *experts* is sometimes admissible.³ (a)

§ 4. The most frequent claims against attorneys relate to alleged negligence in connection with *suits at law*. Thus it is held, that an attorney, bringing an action for his client, within a limited jurisdiction, on a cause of action arising out of such jurisdiction, is liable for negligence.⁴ So an attorney, before he takes upon himself to sue out a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to carry out the object of the action.⁵ So, where an attorney for the plaintiff suffered the case to be called on, without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited: in an action against him for negligence, held, that it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and, the jury having found in the negative, the court refused to disturb the verdict.⁶ (b) So an

¹ Godefroy v. Jay, 7 Bing. 413.

² Parker v. Rolls, 14 Com. B. 691; 6 Eng. 212.

³ Pennington v. Yell, 6 Eng. 212.

⁴ Williams v. Gibbs, 6 Nev. & Man. 788.

⁵ Cox v. Leech, 38 Eng. L. & Eq. 271.

⁶ Reece v. Rieby, 4 B. & Ald. 202.

(a) In an action against an attorney for negligence, as such, the fact that the plaintiff continued to employ him, after knowing of such negligent conduct, is evidence on the question of damages. *Derrickson v. Cady*, 7 Barr, 27.

Proceeding on motion against an attorney for money collected is no bar to a recovery in an action on the case for damages. *Coopwood v. Baldwin*, 25 Miss. 129.

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable on the contracts made by the other within

the scope of the partnership business, and for his negligence in respect to a partnership contract; and a right of action against the firm survives against the survivor alone. *Livingston v. Cox*, 6 Barr, 360.

(b) In a suit against an attorney for neglecting to defend an action, his declarations made to the court when the action was called on for trial, that he had no defence to make, because his client, though requested to instruct him in a defence, had not done so, are admissible in evidence; not to prove the truth of the facts stated, but the circumstances which

attorney is bound to sue out the proper process against bail.¹ So against an officer for taking insufficient bail, or not delivering over the bail-bond.² So he is bound to deliver an execution to an officer in season to preserve an attachment.³ But not to attend in

¹ *Dearborn v. Dearborn*, 15 Mass. 316; 6 Eng. 312.

² *Simmons v. Bradford*, 15 Mass. 82; *Crooker v. Hutchinson*, 1 Vt. 73.

³ *Phillips v. Bridge*, 11 Mass. 242, 246.

occurred at the time of the alleged negligence. *Salisbury v. Gourgas*, 10 Met. 442.

When an attorney is sued by his client for negligence and unskilfulness, he cannot set up champerty in the contract as a defence. *Goodman v. Walker*, 30 Ala. 482.

Nor that he consulted a distinguished attorney respecting the proper course to be pursued by him, or that the arrangement made by him was, in the opinion of the witness, the best that could be made for his client's interest. *Ibid.*

An attorney is responsible for losses caused by his disregard, in bringing a suit, of a rule of law which was well and clearly defined, both in the text-books and the reports, and which had existed and been published long enough to justify the belief that it was known to the profession. *Ibid.*

An attorney's receipt for a claim, placed in his hands for collection, is admissible evidence against him, in an action for negligence and unskilfulness, to prove the relation of attorney and client; and the record of the suit on the claim is also admissible against him, to prove the final determination of that suit, although it was conducted by him in the name of another attorney. *Ibid.*

In an action against attorneys for negligence and unskilfulness, a count is sufficient, which alleges that they conducted the suit so negligently and unskilfully, "in not having a certain writ of attachment, affidavit, and declaration, before then prepared by them in said action, prepared, drawn up, and filed, and made out according to the laws of said State and rules of said court, that the said plaintiff, by the said neglect of, &c., was hindered and prevented from recovering judgment, &c., and was forced and compelled to release and dismiss the levy of said writ of attachment;" or "by reason whereof the said plaintiff has been prevented from recovering her demand," &c. Or a count which alleges that the defendants, through want of care and skill, "did dismiss the levy of a certain writ of attachment," before that time

levied on the property of the defendants therein, and "did dismiss, relinquish, and release all liens which had attached or accrued by virtue of said levy," &c., and that, by means of the unskilful management of the defendants, the plaintiff "lost her said demand, and the means of recovering and collecting the same." *Walker v. Goodman*, 21 Ala. 647.

The distinction is made, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution, but all such as may become necessary. Also, to pursue bail, and those who may have become bound with the defendant, in the progress of the suit, either before or after judgment. But not to institute new collateral suits, without special instructions, such as actions against the sheriff and clerk for the failure of their duty. *Pennington v. Yell*, 6 Eng. 212.

When an attorney died, twelve days before the return-day of an execution, in a case where real estate had been attached by the original writ, without having levied the attachment, and the attachment, not being subsequently levied, was lost; it was held, that the attorney was not liable for damages for the loss of the attachment. *Holmes v. Peck*, 1 R. I. 242.

So where, a trader having petitioned the Court of Bankruptcy under the 211th section of the 11 & 13 Vict. c. 106, an order was made under § 219, that his estate and effects should be possessed and received by the official assignee, and be taken possession of by the messenger; and one of the creditors employed the plaintiff (an attorney) to prepare an assignment of his effects for the benefit of the general body, informing him that all would concur therein; and, the assent of all the creditors not having been obtained, the assignment became unavailing: it was held, that the plaintiff was not guilty of gross ignorance or gross negligence in preparing the assignment under such circumstances. *Lewis v. Collard*, 14 Com. B. 208.

erson to the levy of an execution.¹ Nor search for property.² or to convey to a sheriff his client's directions for seizing goods in an execution.³ But an action lies against an attorney, for neglecting to charge a person in execution at his client's suit, according to a rule of court; although the omission was rather from want of judgment than from negligence. And, in such action, the question, what is reasonable skill, is for the jury.⁴ So, when an attorney takes the responsibility of dismissing a suit, on receiving payment claims against other parties, he renders himself liable for the amount of the claim on which the action was founded, unless he proves that a judgment on that claim would have been of no value.⁵ So, it seems, an attorney is liable for receiving payment of a claim in depreciated money.⁶ So an attorney cannot abandon a cause which he has undertaken for want of funds, without reasonable notice to his client. Thus where an attorney notified the client, five days before the commission day, that he would not deliver briefs unless supplied with funds for fees of counsel, and, they not being furnished, counsel were not instructed, and a verdict was rendered against the client; held, the attorney was liable for negligence, if the jury should find that he had not given reasonable notice.⁷ But an attorney retained to conduct a cause may compromise without the consent of his client, if he acts in good faith and with due and reasonable care, and in a manner advantageous and beneficial to his client, and not in defiance of his express directions.⁸ (a)

§ 4 a. An attorney is not liable for not setting up in defence facts communicated to him by his client, without proof of them, and showing that they could have been proved by the exercise of proper diligence.⁹ Nor for failing to apply for a new trial upon a point of law.¹⁰

§ 5. In regard to *the collection and appropriation of money*, it is held, that an attorney, who takes a note to collect, is not chargeable with it, unless he has received the money and refused to pay it over, or unless he might have made it, and has not, through his

¹ Williams v. Reed, 3 Mas. 405; Penington v. Yell, 6 Eng. 212.

² 6 Eng. 212.

³ Ford v. Williams, 3 Kern. 577.

⁴ Russel v. Palmer, 2 Wils. 325.

⁵ Coopwood v. Baldwin, 25 Miss. 129.

⁶ Trumbull v. Nicholson, 27 Ill. 149.

⁷ Hoby v. Built, 3 B & Ad. 350.

⁸ Chown v. Parrott, 14 C. B. N. S.

74.

⁹ Hastings v. Halleck, 13 Cal. 203.

¹⁰ Ibid.

(a) If the fees of an attorney are contingent on success, and the client settles without the attorney's consent, he can

recover what his services were worth. Quim v. Ophir, 4 Nev. 304.

neglect, more especially if gross, or unless the debt has been lost through his unskilfulness.¹ Nor is alleged negligence in collection of money proved by mere failure to account.² In general, it is held, that no action can be maintained against an attorney for money collected by him until demand has been made. An attachment sued for after six years have elapsed from the inception of the claim will not be allowed. And it was refused in proceedings therefor, instituted against an attorney for money collected and not paid over by him, when six years had elapsed since the demand for such money.³ The distinctions are made, that, where the relation of attorney and client involves *a series* of acts and duties, an attorney is not suable, until the relation is dissolved. So where the relation involves only a single transaction, as the collection of a debt; he is not to be instantly annoyed with an action, nor suit brought until demand made. But if an attorney does not pay over, or give notice of money collected, in a reasonable time, it is culpable negligence, for which an action may be brought without demand.⁴ And if an attorney undertakes to collect a debt, and by his gross negligence makes it of less value and embarrasses the collection of it,—as by taking a note and mortgage contrary to the direction of his client; he is liable, although the debtor is still solvent.⁵ (See p. 480.) And if he collects money under the direction and in the name of an agent, knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent; this is not a discharge of the attorney from his liability to his principal.⁶ (a)

¹ Nisbet v. Lawson, 1 Kelly, 275; Oldham v. Sparks, 28 Tex. 425. See Fleming v. Culbert, 46 Penn. 498; Ross v. Gerrish, 8 Allen, 147; Pidgeon v. Williams, 21 Gratt. 251; Johnson v. Semple, 31 Iowa, 49; Croft v. Hicks, 26 Tex. 383; Hazelrigg v. Brenton, 2 Duv. 525; Morrill v. Graham, 27 Tex. 646.

² Bougher v. Schobey, 23 Ind. 583.

³ People v. Brotherson, 36 Barb. 662. See Bougher v. Schobey, 16 Ind. 151; Black v. Hersch, 18 Ind. 342.

⁴ Glen v. Cuttle, 2 Grant, 273.

⁵ Wilson v. Coffin, 2 Cush. 316. See White v. Goffe, 24 Tex. 658.

⁶ Nisbet v. Lawson, 1 Kelly, 275.

(a) If an attorney realize a fund upon a judgment in his own favor out of his client's debtor, he is not bound to apply the fund to the satisfaction of his client's debt. Cox v. Sullivan, 7 Geo. 144.

Where a solicitor allowed shares belonging to a client to be forfeited by neglect, and afterwards replaced such shares, giving less than would have originally been paid; held, the client could only claim to be placed in the same position as if the shares had never been forfeited. Smith v. Pocock, 23 Eng. L. & Eq. 470.

The damages, to which an attorney is

liable for neglect, do not necessarily extend to the whole amount of the debt which he assumes to collect, but only to the loss which his client has actually sustained. Cox v. Sullivan, 7 Geo. 144.

An attorney, who, after making a part of certain collections, under a special contract to be allowed a certain share for his services, refuses his client's demand to account, cannot claim the benefit of the contract as to money thereafter collected. McDowell v. Baker, 29 Ind. 481.

An attorney cannot set up that the claim collected was illegally acquired

§ 6. In regard to the *sufficiency of securities* taken by an attorney, or the *investigation of titles* to estates; where a solicitor had invested his client's money, on security which proved altogether insufficient, it was held that this was such gross negligence as almost to amount to fraud; and that the client could claim the amount, in a suit for the administration of the solicitor's estate, without establishing the client's right at law.¹ So an attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.² So the plaintiff employed the defendant, an attorney, to sue A for a debt. A, to induce the plaintiff to forbear to sue, offered to give him a mortgage on some freehold property in which he had a reversionary interest. The plaintiff agreed to accept it, under the advice of the defendant, who was accordingly employed by him to act as his attorney in respect to the mortgage transaction, and to prepare the mortgage-deed. The defendant stated to his clerk, that he must write to his town agents to make the necessary searches, to see whether A had taken the benefit of any of the insolvent acts. No such letter appeared to have been written, but he sent his clerk to inquire personally of A whether he had ever been insolvent. A denied that he had, and the mortgage was executed, and the proposed action was dropped. A had in fact previously petitioned the insolvent court, and obtained an order for his protection. Held, this action, for neglect and unskilfulness, was maintainable, since the defendant, by his own language and conduct, showed that he had a suspicion on the subject, and felt that it was his duty to make a search, which he had not done.³ So, in an action for negligence against an attorney, employed by a purchaser to inspect the title, it appeared, that, by indentures of lease and release, of the 9th and 10th of October, 1796, the estate had been conveyed to A, the father of the vendor's wife, and to

¹ Smith v. Pocock, 23 Eng. L. & Eq. 470. See Arnold v. Robertson, 3 Daly, 298.

² Miller v. Wilson, 24 Penn. 114.

³ Cooper v. Stephenson, 12 Eng. L. & Eq. 403.

either by the plaintiff or by his assignor, the original owner. Fogerty v. Jordan, 2 Rob. (N. Y.) 319.

An attorney, who uses money collected as his own, is liable for interest. Mansfield v. Wilkerson, 26 Iowa, 482.

A summary application to compel an attorney to pay over money is only entertained on motion of the client, not of his assignees. Hess v. Joseph, 7 Rob. (N. Y.) 609.

B, to hold unto the said A and B, and their heirs and assigns, to the use and behoof of the said A and B, and the heirs and assigns of the said A forever, the estate of B being used only in trust for A, his heirs and assigns. A devised the estate to his daughter, and to the heirs of her body; but, in case she died, without leaving any issue of her body living at her decease, then to his nephew C and his heirs forever. The daughter, afterwards, by bargain and sale of the 11th of February, 1814, conveyed the estate to one D, to the intent that he might become tenant of the freehold, for the purpose of suffering a recovery, which was accordingly suffered. The daughter, afterwards, by deeds of lease and release of the 4th and 5th of March, 1814, executed upon her marriage, reciting that she was seised in fee-simple of the estate, conveyed the same to two trustees, in trust for her and her husband and their issue, and, in default of issue, to such person as she should appoint. The marriage was afterwards solemnized, and the daughter died without issue, and devised the estate in fee to her husband, who survived her. The husband, having contracted to sell the estate to the plaintiff, delivered to the defendant, as attorney to the vendee, an abstract of his title, containing the deeds of the 9th and 10th of October, 1796, but not certain indentures of lease and release of the 25th and 26th of February, 1814, whereby B conveyed the estate vested in him to the daughter of A in fee; but an abstract of these deeds was delivered by the vendor's solicitor to the defendant, four months before the conveyance of the estate was executed. The defendant laid before counsel a case, containing an abstract of the deed of the 11th of February, 1814, and of the recovery suffered in pursuance of it, of the deeds of the 4th and 5th of March, 1814, and of the will of the daughter of A, but omitting altogether the deeds of the 9th and 10th of October, 1796; and it further stated that A was seised in fee of the premises. The opinion of counsel was, that the vendor had a good title; but that opinion would not have been given, if the deeds of lease and release of the 9th and 10th of October, 1796, or those of the 25th and 26th of February, 1814, had been stated. The plaintiff, afterwards, being advised that his title was incomplete, paid a sum of money to C, the devisee in remainder, for a confirmation of his title. Held, first, that the recovery was invalid, because at that time the legal estate for life was in B, and she was only equitable tenant for life, with a legal remainder in tail, and,

therefore, that the title was bad ; and that a jury were warranted in finding the defendant guilty of negligence, so as to make him liable in this action.¹ (a)

§ 7. Whether negligence can be set up as a *defence to an action for an attorney's bill of fees*, is a point which has been much questioned. (b) If the services have proved entirely useless, it has long been agreed, that this may be shown in bar of the whole action ; and, after some conflict of opinions, the weight of authority seems in favor of admitting any competent evidence of negligence, ignorance, or want of skill, as a defence to an action for professional services, as well as for any other work and labor.² It is said, in order to recover his bill of costs, the attorney is bound "to show affirmatively that he has done all that he ought to have done."³ Thus, the defendant having insured in London goods on a voyage to Calcutta, and the goods having been damaged on the voyage, the defendant instructed the plaintiff, an attorney, to take steps to obtain compensation from the underwriters. The plaintiff wrote letters to them, demanding payment ; and, this being ineffectual, took out writs against them in the lord mayor's court, and, after issue joined, applied for a commission to examine witnesses in India, which that court had no power to grant, and the actions were accordingly discontinued. The plaintiff having sued the defendant for his costs ; held, that the plaintiff, from the nature

¹ Ireson v. Pearman, 3 B. & C. 799.

² 2 Greenl. Ev. § 143 ; Nixon v. Phelps, 3 Will. 198 ; Judah v. Trustees, &c., 23 Ind. 272.

³ Per Lord Tenterden, Allison v. Rayner, 7 B. & C. 441.

(a) Where a conveyancer, with no want of ordinary skill and caution, passed a title to certain ground-rents, incumbered by an unliquidated judgment, after taking legal counsel, and being informed therein that the title was clear ; held, an error of judgment, for which, as in the case of practitioners of law or medicine, an attorney ought not to be liable in case of reasonable doubt. *Watson v. Muirhead*, 57 Penn. 161.

(b) See *Cristie v. Sawyer*, 44 N. H. 298 ; *Fenno v. English*, 22 Ark. 170 ; *Judah v. Trustees*, 16 Ind. 56. It is held that a declaration against an attorney for negligence must aver the payment of fees. *Cavillaud v. Yale*, 3 Cal. 108.

See, as to the general requisites of such declaration, *Wilson v. Coffin*, 2 Cush. 316. As to an amendment thereof, *Holman v. King*, 7 Met. 384.

Upon a rule on an attorney to answer, the charge against him being, that he had

received from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued ; it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge and pay the costs of the application. *Eyre*, 1 C. B. N. S. 151.

An attorney who has voluntarily withdrawn from a suit is not entitled to withhold a paper in his hands, and prevent it from being used as evidence, until payment to him of the previous costs, that would be taxable for the plaintiff in case of his ultimate success. *White v. Harlow*, 5 Gray, 463.

The distinction has been made, that a jury may strike out from an attorney's bill an item wholly useless ; but where it is partially useless, or he has been guilty of negligence, there must be a cross action. *Shaw v. Arden*, 9 Bing. 287.

of the defendant's claim, must or ought to have known, that it would be necessary to take the evidence of witnesses in India, and was bound to have ascertained, before suing there, that the lord mayor's court could issue a commission, and, therefore, could not recover his costs; but that he might recover for the letters, as they might have produced payment.¹ So an attorney received from O. and A., agents of C. L. & Co., of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O. and A.) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all indorsed to C. L. & Co. The attorney thereupon brought the action in the names of O. and A., and discovering afterwards, when the bills were for the first time shown to him, that there was no special indorsement to O. and A., as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co. Held, that the suing in the names of O. and A., without having first ascertained that they were in a position to maintain an action on the bills, was such gross negligence, as to disable the attorney from recovering the costs of the abortive action.²

§ 7 *a*. But while an attorney should advise his client to the best of his judgment, and, if the client refuse to follow the advice, it is safer for the counsel to follow the client's instructions, so far as the rules of law will permit; yet, if the client sues the attorney for disregarding his instructions, he must show, presumptively, at least, that he was damaged thereby. And where a motion, which the client wished to have made, would probably not have been granted, and would have been likely to injure him; and it would have been highly injudicious to put in certain evidence, the omission of which was complained of: the attorney recovered his bill.³ So although the plaintiff commenced a former action on the same ground while continuing to be the defendant's attorney, and caused an attachment to be levied on the subjects of litigation in the respective suits in which he was attorney.⁴ So counsel, who undertake to defend a client upon a criminal accusation, do not thereby agree to defend his bail upon a *scire facias* on the recognizance. And where the defendant did not appear at the first term, and died before the next; held, his representatives could not set up failure of consideration, as a defence to a note given to the attorney, for

¹ Cox v. Leech, 38 Eng. L. & Eq. 271; 1 C. B. N. S. 617.

² Long v. Orsi, 37 Eng. L. & Eq. 253.

³ Nave v. Baird, 12 Ind. 318. See Bowman v. Tallman, 2 Rob. 385.

⁴ Porter v. Ruckman, 38 N. Y. 210.

services to be rendered in defending the accused.¹ So, after the issuing of a writ in an action on a common money bond, the defendant wrote, stating that he had paid a part and could prove this, and that he was ready to pay the rest. The attorney for the claimant did not apply for an order of reference under the Common-law Procedure Act, 1854, § 3, but delivered a declaration, to which the defendant pleaded payment. When the cause, after a considerable lapse of time, was in the paper for trial, a judge's order was obtained by consent to refer the matter to the master to take the account; and he made his *allocatur* in favor of the plaintiff for debt and costs. After the letter was written, and before the *allocatur* was made, the defendant became bankrupt. In an action brought by the attorney for the plaintiff against the plaintiff, on his bill, and in a cross action for negligence, the attorney admitted in evidence that the section did not occur to his mind on reading the letter, and that he could not say that the section ever came to his memory. Held, that there was no evidence of negligence on the part of the attorney in not applying for an order under the section; for that it would not have clearly appeared to any reasonable person, that the matter in dispute consisted either wholly or in part of matters of mere account, which could not conveniently be tried by a jury.² So an attorney-at-law may consent, that a judgment obtained by the plaintiff, his client, upon the defendant's failure to answer, be vacated, and the defendant allowed to answer; on a state of facts on which the court, according to its customary practice, would make an order to that effect. Such a consent, and the failure of the defendant before judgment, are not alone sufficient evidence of negligence, to defeat an action brought by the attorney for his services in the suit. But if he consents without the knowledge of his client, he is responsible for any loss which may necessarily result, and which would have been avoided, if his client had been informed of the facts. It is not erroneous to reject evidence, that, at the time of vacating the default, the debtor had property, out of which the judgment could have been collected, when no evidence has been given of such negligence of the attorney in opening the default, as will affect his right to recover for his services, and when such fact, with the other evidence given or offered to prove negligence, is insufficient to establish it *prima facie*.³

¹ Headley v. Good, 24 Tex. 232.

² Clussman v. Merkel, 3 Bosw. 402.

³ Chapman v. Van Toll, 8 Ell. & Bl. 896.

§ 8. In relation to the liability of an attorney to a party wrongfully sued; (a) an attorney, who maliciously and illegally sues out process, is thus liable.¹ And an attorney, directing the issue of an execution, and afterward refusing to state whether or not he had ordered its levy upon certain property, which was levied on, by order of his client, but taking the responsibility upon himself and inviting suit against himself by the owner, is estopped from denying in such suit his complicity and responsibility.² So where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass.³ So an action for false imprisonment lies against the plaintiff's attorney, who sues out a void *ca. sa.*, and delivers it himself to the officer, who, by his order, arrests the defendant thereon.⁴ So, in an action of trespass against the petitioner's attorney, for falsely and maliciously imprisoning the plaintiff; upon a plea of not guilty, the plaintiff proved that the defendant had indorsed his name and address on the warrant sued out for the petitioner, on which the plaintiff was committed. Held, sufficient evidence to support a verdict for the plaintiff on such plea. And the doctrine was laid down, that an attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad. And although, it seems, the act of the attorney, in handing over the warrant for execution, might be so divested of any further proof of concurrence on his part, that he would not be liable; he is liable, if his conduct in or after the performance of such act shows a motive beyond the mere wish to discharge professional duty; as if, after the commitment, he has improperly delayed giving information as to costs, which was required by parties wishing to pay such costs and thereby purge the contempt.⁵ So if an attorney, who has commenced a suit, knew that there was no cause of action, and dishonestly, and for some sinister view, ill purpose, or purpose of his own, which the law calls malicious, caused a party to be arrested

¹ Warfield v. Campbell, 35 Ala. 349.

² Ford v. Williams, 24 N. Y. (10 Smith) 359.

³ Codrington v. Lloyd, 3 Nev. & Per. 442; 8 Ad. & Ell. 449.

⁴ Barker v. Braham, 2 W. Black. 866.

⁵ Green v. Elgie, 5 Ad. & Ell. N. S. 99.

(a) Upon this subject it is said, by an eminent judge: "The distinction is not between attorney and client, but between both of them and the officer whom they employed to execute his known duty in giving effect to the judgments and orders of competent courts. An attorney may be in the nature of an officer handing over papers which may be afterwards acted

upon, with no more concurrence than that of a postman who conveys a letter. When such is his conduct, this principle may protect him; but if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences." Per Lord Denman, 5 Ad. & Ell. N. 114. See vol. i. p. 139.

and imprisoned ; he will be liable therefor. So if he knows that his client is actuated by illegal or malicious motives. And it is not necessary to show a conspiracy between attorney and client. It is a sufficient averment, that he falsely and maliciously, without having any reasonable or probable cause for so doing, sued out the writ, and falsely and maliciously caused the party to be arrested under it.¹ So if an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained.² So no privileges will protect an attorney from a suit for damages, where he has procured or advised a judicial officer to act beyond the scope of his jurisdiction. Thus an attorney advised a single justice to send to jail one who was brought before him on a charge of felony, whereas such power was delegated only to two justices. Held, such attorney was liable in damages ; though not upon the mere fact, that he sues out the warrant, before any irregularity has been committed.³

§ 9. But an action on the case will not lie against an attorney-at-law, for acts done *bonâ fide* in the prosecution of his client's rights. It must be shown that they were malicious and without foundation. Thus an attorney, who merely issues an execution, and communicates to the sheriff the directions of his clients to seize thereon specified property, is not liable as a trespasser, though the seizure is wrongful. Nor although, pursuant to the authority and direction, and in the name of the plaintiff, he executes a bond of indemnity to the officer. Nor is such bond invalid, for want of authority under seal to execute it ; such an instrument binding the principal as his simple contract, it not being required by law to be under seal. So an attorney is not liable, civilly, for ordering a levy on property, if he act in good faith and on reasonable cause, and probably correctly.⁴ So A and B, attorneys, partners, delivered to a bailiff, for the purpose of being executed, a precept, issued from a local court, indorsed with the attorneys' names, and directing a levy upon goods within the jurisdiction. The attorneys carried on business at Falmouth ; and the

¹ Burnap v. Marsh, 13 Ill. 535.

² Barber, 6 Eng. L. & Eq. 338.

³ Revell v. Pettit, 3 Met. (Ky.) 314.

⁴ Wigg v. Simonton, 12 Rich. 583 ;
Ford v. Williams, 3 Kern. 577 ; Hunt v.
Printup, 28 Geo. 297.

party to be levied upon had had for many years a house and goods at Penryn, and was not known to have a residence or property elsewhere. The levy was made in that house. The attorneys had sent a message to the debtor, as to the time at which the bailiff would levy; and the bailiff, while levying, said that he was employed by those attorneys. In an action against them and the bailiff for unlawfully levying, the attorneys pleaded, 1. Not guilty. 2. A justification under the process. The bailiff pleaded the justification only. The plaintiff replied, that the house was not within the jurisdiction; and issues were joined thereon. Held, 1. That the attorneys were not entitled to an acquittal at the close of the plaintiff's case, in which the facts had appeared as above stated. 2. That on the close of the whole case, nothing material having been added, except that the defendants, though they proved a regular judgment, failed to bring themselves within the jurisdiction, the judge ought to have told the jury, that there was no evidence to implicate the attorneys. And this, even assuming them to have known that the bailiff intended levying at the house in question; although, if they had known also that the house was beyond the jurisdiction, they might possibly have been considered joint trespassers with the bailiff.¹ (a) So S., appointed attorney for

¹ Sowell v. Champion, 6 Ad. & Ell. 407. See Oakley v. Davis, 16 E. 82.

(a) To an action against an attorney for ordering an arrest upon an execution, it is a good defence, that the plaintiff has recovered judgment upon a written agreement to discharge the judgment and execution. *Smith v. Way*, (Mass.) Law Reg., December, 1865, p. 126.

Cases have arisen, between attorneys and other persons, not parties, connected with the actions in which such attorneys were employed. Thus A, a defendant's attorney, requested B, the plaintiff's attorney, to forbear charging the defendant in execution until next term; falsely represented to B that he had the authority of the defendant to consent thereto; and gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of the defendant, according to the rule. B forbore to charge the defendant in execution until the next term, and the defendant was discharged for the above reason. Held, no action was maintainable by B against A. *Hewitt v. Melton*, 1 Crompt., M. & R. 232.

A sheriff declared in case, for that, the defendants being attorneys of P., who

had sued out a *ca. sa.* against John Wright, and the sheriff having in custody (under another *ca. sa.*) another John Wright, who was entitled to his discharge, the defendants, well knowing the premises, falsely represented to the sheriff that the last-mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof the defendants caused the sheriff to detain the J. W. who was in his custody; for which the last-mentioned J. W. sued the sheriff, and he paid money by way of compromise. The attorneys pleading not guilty, evidence was given, for the sheriff, that his officer delivered a note to the defendant's managing clerk in P.'s action, describing the John Wright who was in custody, and inquired if that was the John Wright whom they had sued on the behalf of P.; and that the clerk took the letter into the office where the defendants were, and afterwards returned and told the officer that that was the John Wright; neither the defendants nor the clerk at that time knowing the contrary. Held, by the Court of Queen's Bench, that, on this evidence, the jury were warranted

C. in place of W., who had been arrested and imprisoned for debt, obtained an order for the delivery to him of all papers and docu-

in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the misstatement of their clerk. Also, that the action lay, though the detainer was made, and the money for compromise paid, by the sheriff's officer, and not by himself.

But held, by the Court of Exchequer Chamber, that a plea, alleging that the defendants had good and probable reason to believe, and did with good faith believe the representation to be true, was an answer to the action. The Court of Queen's Bench having given judgment for the plaintiff *non obstante veredicto* on this plea, judgment reversed. *Evans v. Collins*, 5 Ad. & Ell. N. S. 804.

In an action by a sheriff against an attorney-at-law, for false representations that he was authorized to execute a written contract of indemnity, in the name of the plaintiffs in various writs committed by him to the sheriff for service, and thereby inducing him to accept the same, and attach and sell property; to justify a verdict for the plaintiff, the jury must be satisfied that the defendant had no right, either from previous appointment or subsequent ratification, to sign the contract as attorney; that he falsely pretended that he had such authority, knowing that he had not, or having no reason to suppose that he had; and that the plaintiff, upon the faith of that representation, proceeded to perform official acts and thereby to incur liabilities, and, by so acting, and being so misled, had sustained loss and damage. *Jones v. Wolcott*, 2 Allen, 247.

No action will lie by an attorney, against a judge of a court of general jurisdiction having power to admit and remove attorneys, for his removal for malpractice, unless, perhaps, in a case where the judge has acted maliciously and corruptly. *Randall v. Brigham*, 7 Wall. 523. See p. 478, n.

A case of great interest and importance (*Swinfen v. Lord Chelmsford*),¹ relating to the subject of the foregoing chapter, has recently occurred in the English Court of Exchequer. Although predicated in part upon a distinction between *barrister* and *attorney*, not generally recognized in the United States (see 2 Sharswood's Black. 165); it embodies

a general view of the law and an abstract of previous decisions, which entitle it to be cited at length. We subjoin the opinion of Pollock, C. B., which sufficiently sets forth the facts and the pleadings of the case.

For the report we are indebted to the "Law Reporter" for August, 1860, page 232:—

"Pollock, C. B., delivered judgment. The first count set out the devise to the plaintiff of certain real estate by Samuel Swinfen, the filing of a bill in chancery by the heir-at-law, and the direction of an issue *devisavit vel non* by the M. R.; that the issue came on to be tried, and that the defendant, being a barrister-at-law, was retained and employed by the plaintiff to act as her leading counsel on the trial of the said issue, to maintain and support the affirmative thereof, and to conduct the case of the plaintiff on the said trial; that the defendant accepted the retainer, and undertook to the plaintiff to perform his duty to her as such leading counsel in the conduct and management of her case at the trial of the said issue, pursuant to his instructions. That the defendant, after the trial had begun and during the progress thereof, well knowing that he had no authority from the plaintiff to enter into any terms of compromise on her behalf, without the authority and against the will of the plaintiff, and contrary to her instructions, wrongfully and fraudulently, and in neglect and violation of his duty to the plaintiff, entered into what purported to be an arrangement or agreement with Frederick H. Swinfen (the defendant in the issue), through his counsel to compromise the said cause and the right and claim of the plaintiff under the will, and arranged and concluded certain terms of compromise in that behalf, which were signed by the counsel on each side. The declaration then set out the terms of the compromise, the first of which was that a juror should be withdrawn; secondly, that the plaintiff should give up her claim to the estate, and receive an annuity instead. That the defendant wrongfully and fraudulently consented to a juror being withdrawn, and that a juror was withdrawn accordingly, and the defendant failed to perform his duty as leading counsel for the plaintiff, the issue was not tried, and no verdict was

¹ 2 Law Times Reports, N. S. 406; 5 Hurl. & Nor. 890.

ments in the possession of W. relating to the suit. Some of the papers being in the hands of a law-stationer, and others in the

given. The declaration then sets forth the special damage resulting to the plaintiff from the compromise; that she lost the opportunity of then trying the issue and obtaining the verdict of the jury; that an order of Nisi Prius was drawn up, which was made a rule of the Court of C. P., on which proceedings were taken to procure an attachment against the plaintiff for disobedience of the said rule, and she was put to expense in resisting these proceedings. That the defendant in the issue filed a supplemental bill to enforce performance of the compromise, whereby she was put to expense and was kept out of possession of the estate. The defendant pleaded, first, 'not guilty;' and, secondly, that he did not know that he was not authorized to compromise the suit, but, on the contrary, thought that he was authorized; and for a seventh plea to the first count the defendant said that he was retained and instructed as leading counsel merely by the delivery of a retainer to him, and of a brief in the cause delivered in the ordinary way by the attorney of the plaintiff, and without any restriction on the exercise of the discretion to do what he might think best for the interest of his client at the trial, ordinarily exercised by and allowed to a barrister retained by a suitor to hold a brief for him at the trial of an issue or issues of facts by a jury; and that after he was so retained and instructed, and before he did what is complained of, and while the trial was pending, one Charles Simpson, the plaintiff's attorney, informed the defendant of certain circumstances which would be material on the trial, and which the attorney stated made it desirable that the case should be arranged. And the defendant further said that the circumstances then were, in his judgment as counsel, material and important to the issue, and, with the other circumstances of the case, made it expedient and advisable for the interests of the plaintiff that the trial should not be proceeded with, and that an arrangement or agreement should be entered into on her behalf with the defendant for the purpose of compromising the plaintiff's claim. And the defendant says that on account of these matters, and under the circumstances, he consented to the withdrawal of a juror upon the terms stated in the first count as being, in his fair and honest judgment and belief, the best and most prudent and expedient thing to be done for the plain-

tiff, and the best for her interest, and that he did it without fraud or negligence, and in good faith, and in the exercise of the best of his judgment, and in the honest exercise of his discretion as her counsel. By the last plea the defendant denied that he was retained in manner and form as in the declaration mentioned. In summing up the case, I told the jury that in my opinion the law required of a barrister no more than an honest discharge of his duty to the best of his judgment and ability; and though the defendant might have been utterly wrong, and altogether mistaken, or might (as suggested by the counsel for the plaintiff) have been misled by the influence of fear, yet that if his intentions were honest, and he *bonâ fide* meant what he did for the benefit of his client, he was not responsible to that client in damages for any thing that he had done; that an advocate was not bound to do more than to give his best advice, his best consideration, and to conduct the case while in his hands in such a manner as he honestly thought would be for the benefit of his client. I read the second plea to the jury distinctly, and asked them for their verdict on the issue arising on that plea. I further directed the jury, with reference to the seventh plea, the substance of which I stated to them in the terms of the plea, that if it appeared to the defendant, according to the best of his judgment, that what he was doing was for the interest of his client, and taking that view of the case, he honestly did what he did (which was a question of fact for them, the jury, to determine), then, in my opinion, he was not liable in that action, and their verdict ought to be for defendant. We are all of opinion that the rule for a new trial ought to be discharged. This case is of very great and general importance, raising questions as to the duties and responsibilities of the members of the bar, and the obligation under which they come by accepting a retainer and afterwards holding a brief, or (as is more frequently the case) by taking a brief without a retainer. They have no legal claim to any remuneration for the services they render, though they usually receive a fee or *honorarium*, and they undoubtedly, as a matter of fact (in the ordinary course of business), enter into no express contract. The authorities on the subject are very

hands of counsel, both of whom claimed a lien upon them for fees, W. was unable to comply with the order. S. accordingly made

few; on this particular case there is no direct authority at all,—that is, there is no instance of the decision of a court upon a similar question between the client and the advocate; the indirect authorities are chiefly *obiter dicta* of judges in the course of giving judgments in other cases, and they chiefly relate to the analogous profession of a physician. There are, no doubt, *dicta* in Rolle's Abridgment, which would seem to imply that a man of the law, as he is called, might be responsible for not performing his duty; but when the year-books are referred to, it seems very uncertain whether these *dicta* proceed from the bench or from the bar; and, if from the bench, they are not given as a judgment in the case before the court, but merely as an illustration of the argument or point under discussion. More recently expressions occur which appear to have the same tendency, such as leaving the suitor to his remedy against the counsel, an expression on which much stress was laid in the argument. This occurs with respect to the case of Sir George Downing. The case is reported in the Equity Cases, Ab. p. 165, but the remark referred to was made by Lord Chancellor Talbot in *Bradish v. Gee*, Kenyon, 176, when the case of Sir George Downing was cited. But in all the modern cases where any question has arisen between the barrister and the client, it has been decided in favor of the barrister, and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and, on the other hand, there are instances where such an action has been successfully resisted. Upon an express agreement the barrister would, no doubt, be liable as any other person or party to a contract; so if he intentionally did a wrong, and acted with malice, fraud, or treachery, we think he would be responsible, like every other wrongdoer, for the mischief thereby occasioned, notwithstanding his position as a barrister. The case of *Fell v. Brown*, 1 Peake, N. P. Cas. 96, was an action against a barrister for unskillfully and negligently settling and signing a bill in equity, which was referred to the master, and the plaintiff was obliged to pay the cost of the reference. It was contended that the negligence was very gross. Lord Kenyon nonsuited the plaintiff on the

opening, stating his clear opinion that the action could not be supported. He said it was the first action of the kind, and he hoped it would be the last. The opinion of Lord Kenyon was never questioned, although he invited an appeal to the court, stating that he took a note for that purpose. Some months afterwards another case (*Turner v. Phillips*, Ib. 166) came before Lord Kenyon. It was an action to recover back a fee paid to a barrister to attend the trial of a cause, he not having attended. The parties agreed to settle the matter out of court, but Lord Kenyon expressed a clear opinion that the action would not lie, and referred to the case of *Chorley v. Bolcot*, then recently decided, 4 T. R. 317, in which it seemed to be taken for granted that a barrister would not be liable. We have delayed giving judgment in the hope of being unanimous upon the broad and general questions that arise in the case; but, although we are unanimous as to the mode in which this rule should be disposed of, we have not been able to agree as to all the points that belong to the general question; and, perhaps, as we are not sitting in a court of the last resort, it is the less necessary that we should go into the whole question and discuss and decide all the points that belong to it. We are all of opinion that an advocate at the English bar accepting a brief in the usual way undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may indeed occur where, on an express promise (if he made one), he would be liable in *assumpsit*; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the court in which the duty is to be performed and the public at large have an interest. We proceed, therefore, to give the reasons of our judgment, assuming (as the jury have found) that every thing done by the defendant was done in honesty and good faith. The complaint on the first count is twofold: first, it is said the defendant consented to a juror being withdrawn, and so prevented the cause from being tried; secondly, it is alleged that the defendant agreed that the estate in dispute, to which she was asserting her title under the will, should be given up, and con-

affidavit that W. had neglected or refused to obey the order, without, however, setting forth his excuse, and a writ of attachment

veyed to the heir-at-law. Now, as to the first of these allegations, we are all of opinion that no action lies, taking along with the other facts the verdict of the jury. The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may ultimately turn out to be quite erroneous. If he were so liable, counsel would perform their duties under peril of an action by every disappointed and angry client. We think, therefore, that no action lies against the defendant for consenting to withdraw a juror, even though contrary to the client's instructions, provided it be done *bonâ fide*, as the jury have found it was done. The other complaint made in the first count is, that the defendant agreed on the plaintiff's behalf that the estate should be given up, and a conveyance of it executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement; that it was not binding, and that the agreement was a nullity; and we are of opinion that, although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think in an action for a nuisance between the owners of adjoining land, however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void. With respect to the case before us, we consider this was the decision of the M. R. and of the

Lords Justices on appeal, and was the opinion of the late Crowder, J., when the case was before the C. B. If the act of compromise was a nullity, the rights of the plaintiff remain the same, and she is, so far as they were concerned, altogether uninjured. But then it is said that she has been put to expenses and incurred costs in resisting attempts to enforce the agreement of compromise in the C. P. and in chancery; but it is a general rule of law that, to subject a person to law proceedings without malice gives no cause of action. The courts of equity awarded such costs as the law allows, and we think she cannot in this action recover more. (See *Doe v. Pillitter*, 13 Mee. & W. 47, and the authorities there cited; and *Coterell v. Jones*, 11 C. B. 713.) The Court of C. B. thought fit not to give her costs, and we think it must be taken that she was not entitled to them, and cannot claim them in this action. See *Malden v. Fyson*, 11 Q. B. 292, and especially that part of the judgment in page 301. We think the law is as we have stated, and there are other instances in the law which illustrate this. No action lies for a prosecution, however groundless, which has occasioned costs, unless the prosecution was also malicious; nor will any action lie for extra costs, however unfounded a suit may be, and even though it was brought vexatiously. On these grounds, then, no action will lie against counsel for any act honestly done in the conduct or management of the cause, including the withdrawing a juror, and the residue of the complaint is that the defendant did a void act, and exposed the plaintiff to legal proceedings, for which, if done *bonâ fide*, no action lies against any one. The words 'wrongful' and 'fraudulent' in the declaration ought to have been proved, and therefore the direction was right. We have assumed, for the purpose of giving judgment, that no authority in fact was given to the defendant to make any compromise, and even that contrary instructions may have been given, and that the defendant was aware of this. It is not, however, to be understood that we have formed, or that we express, any opinion either way. If the defendant, under the circumstances we have assumed, be not liable in this action (as we think he is not), he would *a fortiori* not be answerable if he had au-

issued, under which W., who was still in custody, was detained. Subsequently the writ was set aside, and W. was discharged from custody. Held, neither S. nor his client was liable to W. for false imprisonment.¹

¹ Williams v. Smith, 14 C. B. N. S. 596.

thority, or had reasonable ground for ing contrary to express or implied instructions.” believing that he had, and was not act-

CHAPTER XLII.

TORTS CONNECTED WITH THE RELATION OF HUSBAND AND WIFE.

1. Action by the husband alone.
3. By husband and wife.
5. By the wife alone.
6. Against husband and wife.

15. Mutual personal rights of husband and wife.

17. Action for criminal conversation or seduction, and for enticing away or harboring a wife.

§ 1. THE relation of husband and wife has been almost universally changed by statute in the United States. Hence the very brief consideration of the subject in the following chapter must be regarded as subject to the general qualification, that the point in question has not been regulated by the statutory law.

§ 1 *a*. A husband may in many cases maintain an action alone for an injury to his wife. (*a*)

§ 2. A declaration in *trespass*, for entering the plaintiff's house, taking his goods, and falsely imprisoning his wife, is good after verdict; and the injury to the wife shall be taken as matter of aggravation only.¹ Where an action is brought merely for damage to the real estate of the wife, during coverture, the husband may sue alone, or the wife may be joined in the suit.² So, under a conveyance of lands to husband and wife in fee, they hold not in moieties but in entireties. And the husband may maintain in his own name an action of trespass *qu. claus.* for cutting down and carrying away timber.³ When the injury is such that the husband receives a separate loss or damage, as if in consequence of battery he has been deprived of her service and society, or been put to expense, he may bring a separate action in his own name.⁴ So the defendant, from day to day, secretly sold to A, the wife of the plaintiff, large quantities of laudanum for a beverage, knowing the use to be made of it, whereby her health was seriously injured

¹ Heminway v. Saxton, 3 Mass. 222.

⁴ M'Kinney v. Western, &c., 4 Iowa,

² Tallmadge v. Grannis, 20 Conn. 296.

420; Kavanaugh v. Janesville, 24 Wis.

³ Fairchild v. Chastelleux, 1 Barr, 176.

618.

(*a*) See Adams v. Barry, 10 Gray, 361. It is the general rule, applicable alike to the relations of husband and wife and parent and child, that two actions may often be brought for one in-

jury; one for the personal damages to the party injured; the other for *loss of service*, technically so called, or other mere pecuniary loss. See Rogers v. Smith, 17 Ind. 323.

and the plaintiff deprived of her society, and obliged to expend money for medical and other attendance. Held, an action could be maintained for the injury.¹ So, a husband having by law a right to the services of his wife, whether he requires them or not, and being bound to sustain her, in sickness and in health, it is held that any thing which diminishes the value of the right, or increases the burden of the duty, necessarily occasions a pecuniary loss to the husband. Hence he may maintain an action for slanderous words spoken of the wife, affecting her health and spirits, without proving that her services were of any value, or that he has paid out any thing for medicine and attendance.² (a) So a husband may maintain replevin for personal chattels belonging to his wife at the time of the coverture, without joining her in the suit.³ (b) Or an action for malicious prosecution of the wife.⁴ But a husband, whose wife has been injured by reason of a defect in a highway, cannot maintain an action against the town, to recover for medical and other expenses incurred, or for loss of his wife's services, in consequence of such injury.⁵ So, where the husband distrains and avows for rent arising from the land of the wife, without joining her in the proceedings, it is held that he must show affirmatively that the rent accrued after the marriage; for this cannot be intended, and, if it be not shown, the objection may be taken at the trial.⁶ (c)

¹ Hoard v. Peck, 56 Barb. 202.

² Olmstead v. Brown, 12 Barb. 657.
See Terwilliger v. Wands, 17 N. Y. 54.

³ Brown v. Fitz, 13 N. H. 283.

⁴ Smith v. Hickson, Rep. t. Hardw. 49.

⁵ Harwood v. Lowell, 4 Cush. 310.

⁶ Decker v. Livingston, 15 Johns. 479.
See Sherman v. Ballou, 8 Cow. 304.

(a) Though not unless the persons to whom the words were spoken were justified by some peculiar circumstances in repeating them to the wife. The author of the slander cannot be held accountable for its unlawful repetition. 12 Barb. 657.

It is held in a recent case, that the husband cannot maintain an action on account of mental anguish of the wife. Hooper v. Haskell, 56 Me. 251.

(b) In Massachusetts, suit must be brought by the husband alone, for conversion of chattels bought by the wife with her own earnings. Gerry v. Gerry, 11 Gray, 381.

(c) Independently of statute, a wife cannot maintain an action for the killing of her husband. Wyatt v. Williams, 43 N. H. 102; Lyons v. Woodward, 49 Me. 29.

A divorced husband, though he has

obtained a decree setting aside a deed of land made by order of the court to the wife, cannot maintain trespass against one, who prior to his suit therefor purchased of her and removed timber standing thereon. O'Hagan v. Clinesmith, 24 Iowa, 249.

In New York, a married woman cannot maintain an action, in her own name alone, to recover damages for slanderous words spoken of her. Klein v. Hentz, 2 Duer, 633.

But a complaint, stating that the defendant, as a common carrier, undertook to carry the plaintiff, a married woman, and her baggage, which was her separate property, from San Francisco to New York, and a loss of the property while in the custody of the defendant, is good in substance under the code. Spies v. Accessory, &c., 5 Duer, 662. See p. 502.

§ 3. And in many cases the action for injury to the wife should be brought by the husband and wife jointly. Thus it is held that husband and wife should join in replevin for property of the wife.¹ So, for an injury to the person of the wife during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit.² Thus an action of trespass may be maintained by husband and wife, against a party who drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury.³ So, in an action against a town, for injury done to the wife through defect in a highway, the wife must be joined.⁴ And in such action, for *bodily injury* suffered by the wife, the damages may include loss of labor and the expense of a cure.⁵ (a) So a suit to recover damages for personal property of the wife, sold under execution as the property of the husband, should be brought in the name of the husband and wife to the use of the wife.⁶ So the wife is a proper party with her husband, in an action for trespass to the land of the wife before marriage.⁷ But an action of trespass, for cutting trees on land held by husband and wife in right of the wife, may be brought by the husband alone, or by the husband and wife jointly, at his election.⁸ So husband and wife may join, in an action of the case for obstruction of a way, appurtenant to the wife's land, in their occupation or possession.⁹ So a husband and wife brought

¹ *Brown v. Fifield*, 4 Mich. 322. See *Tillman v. Shackleton*, 15 Mich. 447.

² *M'Kinney v. Western, &c.*, 4 Iowa, 420; *Johnson v. Dicken*, 25 Mis. 580.

³ *Hopper v. Reeve*, 1 Moore, 407.

⁴ *Starbird v. Frankfort*, 35 Me. 89.

⁵ *Sanford v. Augusta*, 32 Ib. 536.

⁶ *Keeney v. Good*, 21 Penn. 349.

⁷ *Hair v. Melvin*, 2 Jones, 59.

⁸ *Allen v. Kingsbury*, 16 Pick. 235.

⁹ *Cushing v. Adams*, 18 Pick. 110.

(a) *A promise*, founded on a consideration, relating to the wife's personal security, does not vest absolutely in the husband, but may be the subject of an action in the name of husband and wife. Thus the plaintiffs, husband and wife, on the trial of an action for a personal injury to the wife, may prove, that she gave money to him to buy a ticket for her passage in the cars to A; that such a ticket was accordingly procured for and received by her; and that she thereupon took her seat in the cars, to be conveyed to A.

Where the declaration, by husband and wife, for a personal injury to the wife, after stating the nature and extent of the injury, proceeded to allege, that, by means of such injury, she became sick, and was prevented from attending to her necessary affairs, and that the plain-

tiffs were thereby forced to, and did, necessarily expend two hundred dollars in endeavoring to effect a cure; held, although the plaintiffs could not recover, in the same action, for the wife's personal injury, and also for the expenses of her cure, yet, in this case, the ground of damages was the wife's personal injury alone, and the statement regarding the expenses of her cure was descriptive of the extent of her injury, and not a distinct and substantive ground of damages, and in that aspect, though unnecessary, was very proper; but if otherwise, yet, as the gist of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it would be presumed, after verdict, that the court confined the evidence to that ground. *Fuller v. Naugetuck, &c.*, 21 Conn. 557.

an action for injury to a right, belonging to her and appurtenant to her land, to take water from a reservoir of the defendant. The declaration stated, that the wife owned the land; that the plaintiffs owned and possessed the right to take the water, as owners and possessors of the land; and that by the wrongful act of the defendant the plaintiffs had been deprived of the use of the water. A verdict having been rendered for the plaintiffs, on a motion in error from the judgment for insufficiency of the declaration: held, that enough was alleged to show a right of action in the wife; that she was properly joined with her husband; and the declaration might be construed as alleging only an injury to her right, enjoyed by them both during the coverture. But if to be regarded as also alleging an injury to his right as distinct from hers, and as founded on a separate interest, then it would be intended that the judge on the trial allowed no evidence except as to injury to her right, and the allegations not pertinent thereto would be regarded as surplusage.¹ (*a*)

§ 4. But, in many cases, husband and wife cannot join in actions for injury to the wife. Thus no action can be sustained by a

¹ Taylor v. Knapp, 25 Conn. 510.

(*a*) In a suit for injuries to the wife, by consent of the husband brought in their joint names, it will be presumed that they were living together at the time the suit was commenced, and the husband cannot show that they were separated, and that the suit should have been brought in the name of the wife alone. *Burger v. Belsley*, 45 Ill. 72.

He may dismiss such suit, unless indemnified against loss by its further prosecution, but he cannot require an indemnity against liability for costs already accrued. *Ibid*.

A husband and wife may sue jointly for an injury to premises occupied by both parties, but owned by the wife in her own right, whether the title of the wife was acquired before or since the (Ill.) act of 1861. *Illinois, &c., R.R. Co. v. Grable*, 46 Ill. 445.

Where husband and wife join in an action for an assault on the wife, it is held that no words or acts of the husband can be proved in mitigation of damages, unless the wife was privy to them. *Everts v. Everts*, 3 Mich. 580. See *Shaddock v. Clifton*, 22 Wis. 114.

Pending an action of trespass by several joint tenants, one of them, a married woman, died. Held, her right of action survived to her husband, who had joined

as plaintiff with her. *Wood v. Griffin*, 46 N. H. 230.

Where a suit is brought by husband and wife for an injury solely to her interest in land, and before judgment the wife dies, the husband cannot proceed alone. *Buck v. Goodrich*, 33 Conn. 37.

Where land is held by husband and wife during their lives and the life of the survivor of them, the non-joinder of the wife as co-plaintiff, in an action to recover the land, is no impediment to a recovery by the plaintiff of the whole estate and interest of both. *Park v. Pratt*, 38 Vt. 545.

In an action against a constable for taking goods belonging to a married woman, acquired and held under the (Md.) act of 1853, c. 245, a count in trespass or trover, in which the husband and wife are joined, must aver what interest the wife has in the property; but a count, which avers that the defendant wrongfully seized, under writs issued upon judgment against the husband, goods belonging to the wife under the act of 1853, c. 245, is good. And the husband may be joined in a count, which alleges that the property belongs to the wife to her sole and separate use. *Barr v. White*, 22 Md. 259.

husband and wife jointly, for the conversion of property which they claim under a mortgage executed to her alone, to secure money lent by her, a portion of which was furnished to her by him.¹ So, in case by husband and wife against the defendant, for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out, &c.; it was alleged, that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, &c. After verdict for the plaintiff, judgment was arrested, because injuries were charged in the action, for which husband and wife could not join.² Nor can husband and wife maintain a joint action of trespass *qu. claus.*, unless it appears that the wife had some interest in the close.³ Nor for an injury to her personal property after the marriage. Such action is bad, on demurrer, motion in arrest, or writ of error.⁴ So husband and wife cannot join as plaintiffs in replevin or detinue, unless where the property is held by the wife in some special character or right. And where a husband attempted to convey property to his wife and a third person as trustees, such conveyance being as to the wife void; it was held that a declaration, joining the wife, a subsequent husband, and the trustee, could not be maintained.⁵ And while the marriage is in full force, the wife should not be joined with her husband, although she lives separate from him, and the action is for an injury to property acquired by her labor or by gift to her.⁶ So a husband and wife cannot jointly sue for a joint slander or libel upon both. The husband should sue alone for the injury to him, and the husband and wife should join for the injury to her.⁷ And the general distinction is, that, when words spoken of the wife are only actionable on proof of special damage, the husband must sue alone; but where they are actionable *per se*, she may unite with her husband in bringing the suit.⁸

§ 5. In some cases, more especially under the operation of recent statutes, the wife may sue alone.⁹ Thus in an action for trespass to land of the wife, of which she was seised to her sole and separate use, the husband ought not to be joined, and the writ can-

¹ Henessey v. White, 2 Allen, 48.

² Barnes v. Hurd, 11 Mass. 59.

³ Meader v. Stone, 7 Met. 147.

⁴ Rawlins v. Rounds, 1 Williams, 17.

See Owen v. Tankersley, 12 Tex. 405.

⁶ Van Arsdale v. Dixon, Hill & Denio, 358; Walker v. Fenner, 28 Ala. 367.

⁵ Moores v. Carter, 1 Hemp. 64.

⁷ Gazynski v. Colburn, 11 Cush. 10; Hart v. Crow, 7 Blackf. 351.

⁸ Williams v. Holdredge, 22 Barb. 396.

⁹ See Peru v. French, 55 Ill. 317; O'Donoghue v. Akin, 2 Duv. 478.

not be amended by striking out his name.¹ So in cases of trust for the benefit of married women, they may sometimes bring actions in their own names. Thus where a statute provides that any married woman, possessing property by virtue of that act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties; an action for an injury to the property of the wife, though the control of it may have been released to the husband, must be brought in the wife's name.² So a bequest to a widow, for her own proper use during her life-time, remainder over, gives her a separate use, and the executors of her after-taken husband, having converted the property, are liable to her in trover.³

§ 5 *a*. In a suit for an injury to a married woman, by malpractice, a discharge of the cause of action, given by the husband to the defendant, is a bar to the suit, notwithstanding the previous desertion of the wife by the husband.⁴

§ 6. The wife may sometimes properly be joined as defendant. (*a*) Thus, in an action for the poisoning of the plaintiff's geese by the defendant's wife, husband and wife should be joined as co-defendants, although it was the sole act of the wife.⁵ But it is held, that, if a chattel be in the possession of the husband, or in the family, along with husband and wife, a refusal by the wife to deliver it on demand is not a *conversion* by her. And a declaration in trover against husband and wife, alleging the conversion to have been, not by the husband alone, but by the defendants to their use, was held bad, on motion in arrest of judgment.⁶ But where a bailiff seized the goods of the plaintiff, under a *fi. fa.* against a third person, and deposited them in an out-building of an inn, with the assent of the innkeeper, whose wife assisted him in the management of his business; and, on a demand upon her to deliver up the goods, she said she had seen the attorney of the

¹ Whidden v. Coleman, 47 N. H. 297.

² Collen v. Kelsey, 39 Me. 298.

³ Snyder v. Snyder, 10 Barr, 423. See Daniel v. Daniel, 6 B. Monr. 230; Huntly v. Ratliff, 5 Ired. 542.

⁴ Ballard v. Russell, 33 Me. 196.

⁵ Baker v. Young, 44 Ill. 42; Matthews v. Fiestel, 2 E. D. Smith, 90. See

Clement v. Wafer, 12 La. Ann. 599; Goulding v. Davidson, (N. Y.) Law Reg., Nov. 1863, p. 34; The Liverpool, &c. v. Fairhurst, 9 Exch. 422.

⁶ Rowell v. Keefe, 6 Rich. 521; Tobey v. Smith, 15 Gray, 535. Contra, Keyworth v. Hill, 3 B. & Ald. 685. See Peak v. Lemon, 1 Lans. 295.

(*a*) See, as to actions against the wife alone, Baum v. Mullen, 47 N. Y. 577; Rowe v. Smith, 45 N. Y. 230; Poole v. Canning, L. R. 2 C. P. 241. Against

husband and wife, Carleton v. Haywood, 49 N. H. 814; Miller v. Sweitzer, 22 Mich. 391; Anderson v. Hill, 53 Barb. 238.

plaintiff in the original suit, that he had told her not to bother herself about them, he would see her harmless; and that she would not give them up: held, in an action of trover against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her.¹ While, on the other hand, an action for stolen goods sold to the defendant's wife, does not lie against him without a demand, for he comes into constructive possession without fault on his part.² So, the gist of the action being, not the defendant's acquisition of the property, but the plaintiff's deprivation thereof, it is immaterial whether the defendant has kept, or destroyed, or delivered it to a third person. Where the wife is guilty of such conversion, the action must be brought against her and her husband jointly.³

§ 6 *a*. The plaintiff delivered a watch to A, under a conditional bargain, that, if he kept it, he should pay an agreed price; or, if he returned it, a specific rent. A died, the price not having been paid, and his wife, with knowledge of the contract, administered upon his estate, and embraced the watch in her inventory. The estate being settled as insolvent, she received the watch, under a decree of the probate court, as part of her allowance, and subsequently sold it as her own private property. Held, the plaintiff had not lost his property in the watch; that the sale by the wife was a wrongful conversion; and that the plaintiff might maintain trover. The wife having again married, prior to the sale, the action was properly brought against the husband and wife jointly.⁴

§ 7. It is held, that, where husband and wife commit a joint *assault*, he should be sued alone.⁵ But the prevailing rule is, that a joint action of trespass may be maintained against husband and wife, for a joint assault and battery by them; and there may be a verdict and judgment against one, and in favor of the other.⁶ And in an action against husband and wife for an assault and battery, where the evidence shows that the wife was the principal and only offender, it is clearly a case to be submitted to the jury. The presumption of coercion, which the law raises where the acts are done by the wife in the presence of the husband, is only *prima facie*, and, like other presumptions, may be repelled. And such action is

¹ *Catteral v. Kenyon*, 2 Gale & Dav. 545; 3 Ad. & Ell. N. S. 310.

² *Gurney v. Kenny*, 2 E. D. Smith, 132.

³ *Davis v. Taylor*, 41 Ill. 405.

⁴ *Jillson v. Wilbur*, 41 N. H. 106.

⁵ *Sisco v. Cheeney*, Wright, 9.

⁶ *Roadcap v. Sipe*, 6 Gratt. 213.

joint and several in its nature, and it is entirely competent to convict the husband and acquit the wife, if she is exempt from liability by reason of the coercion of her husband, or for any other cause. And if the wife is exempt from liability, it is no ground for non-suiting the plaintiff.¹

§ 8. Where an action is brought against husband and wife jointly, for a tort of the wife committed during coverture, she must be served with process; but if she appears and pleads to the merits, she waives her right to except to the want of service, and will be bound by a judgment against her.²

§ 9. Where an action is brought against husband and wife for a *libel* by the wife, no smaller damages are to be assessed than if the libel had been published by her while sole, and the action had been against her alone.³

§ 10. In a suit against the husband for cutting and carrying away timber, the wife has no right to be admitted a party, on the ground that she claims the land.⁴

§ 11. Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet the liability is restricted to torts *simpliciter*. It is otherwise when the fraud is directly connected with a contract by her, and is the means of effecting it, and parcel of the same transaction. Therefore, where a married woman, by a false and fraudulent representation that she was sole, induced a party to advance money to another, on the security of a promissory note signed by her; it was held, that no action lay against the husband and wife.⁵ Nor for false representation that she was a widow, at the time of executing certain securities.⁶

§ 12. A wife cannot be made liable, in an action on the case, for the fraud of her husband, committed upon the exchange of a farm, belonging to her, for another, either on the ground of principal and agent, or of partnership.⁷

§ 13. The husband of an administratrix is liable for the *devastavit* of the wife, whether committed before or during the coverture, if his liability be fixed before the death of the wife.⁸ But where the husband has not by his own acts made himself responsible, he is only liable for a *devastavit* of his wife committed as

¹ Wagener v. Bill, 19 Barb. 321. See L. & Eq. 393; 48 Penn. 497. See Schaeffer v. Fithian, 17 Ind. 463.

² Smith v. Taylor, 11 Geo. 20.

³ Austin v. Wilson, 4 Cush. 273.

⁴ Leach v. Millard, 9 Tex. 551.

⁵ Fairhurst v. Liverpool, &c., 26 Eng.

⁶ Keen v. Hartman, 48 Penn. 497.

⁷ Birdseye v. Flint, 3 Barb. 500.

⁸ Bobe v. Frowner, 18 Ala. 89.

administratrix before marriage, whilst the marriage subsists between them; so that his or his wife's death, before final judgment or decree, discharges his liability.¹

§ 14. A husband is not liable as *executor de son tort*, for acts of the wife, done without his knowledge: otherwise, where he acts or advises her.²

§ 14 *a*. If a husband was present at the commission of a tort by his wife, the *prima facie* presumption is, that she acted under coercion; but this presumption may be overcome by evidence that she was the instigator and the more active party, or by other facts.³ Where a married woman, an administratrix, refused to comply with the statute in returning an inventory, and there was ground to believe that she acted under coercion of the husband; held, an order to show cause, why an attachment should not issue against him or both of them, would lie against both.⁴

§ 15. In reference to the mutual rights of husband and wife; where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction, upon his application, to issue a writ of *habeas corpus*, to bring up her body.⁵

§ 16. It is held, that a husband has no right to inflict corporal punishment on his wife; but may defend himself against her, and restrain her from acts of violence towards himself or others.⁶ (*a*)

§ 17. An action lies in favor of the husband for *criminal conversation* with, or *seduction* of, his wife. And the remedy may be trespass or case.⁷ (*b*) The latter is now the more usual form of action.⁸ In an old case it is laid down, that, if adultery be committed without any force, but by the wife's consent, yet the husband may bring an action on the case, wherefore the defendant

¹ Maffit v. Commonwealth, 5 Barr, 359.

² Hinds v. Jones, 48 Me. 348.

³ Marshall v. Oakes, 51 Me. 308.

⁴ M'Cready's, 1 Tuck. 374. See State v. Cleaves, 59 Me. 298; p. 504.

⁵ Sandilands, 12 Eng. L. & Eq. 463.

⁶ People v. Winters, 2 Parker, 10.

⁷ James v. Biddington, 6 C. & P. 589; Van Vacter v. McKillip, 7 Blackf. 578; Chamberlain v. Hazelwood, 7 Dow. P. C. 816; Parker v. Elliott, 6 Munf. 587. See Preston v. Bowers, 13 Ohio St. 1.

⁸ M'Fadzen v. Ollivant, 2 J. P. Smith, 486.

(*a*) See Fulgham v. State, 46 Ala. 143. In reference to cruelty and violence of the husband towards the wife, as justifying a desertion of him by her, and rendering him liable for her subsequent support; see Breinig v. Meitzler, 23 Penn. 156; Eshbach v. Eshbach, Ib. 343; Harrison v. Harrison, 20 Ala. 629.

As to abuse of a husband by his wife, and consequent violence done to her; see Gordon v. Gordon, 48 Penn. 226. As to

duress upon a married woman, see Eadie v. Shinmon, 26 N. Y. (12 Smith) 9.

In New York, a wife cannot maintain an action against the husband for slander. Freethy v. Freethy, 42 Barb. 641.

(*b*) Seduction is in legal contemplation an injury to the person of the plaintiff, for which, by § 2157 of the (Ala.) Code, an action does not survive against the representatives of the defendant. Garrison v. Burden, 40 Ala. 513.

ravished his wife, without laying it *per quod consortium amisit*.¹ And in relation to the alternative remedies of trespass and case, it is said: ² “Though it is now usual and proper to declare in trespass *vi et armis* and *contra pacem* for criminal conversation, and for debauching daughters and servants; yet as the consequent loss of society or service is the ground of action, the plaintiff is still at liberty to declare in case. When, however, the action is for an injury really committed with force, as by menacing, beating, or imprisoning wives, daughters, and servants, it is most proper to declare in trespass.” Trespass “lies for criminal conversation, seducing away a wife or servant, or for debauching the latter; force being implied, and the wife and servant being considered as having no power to consent.”³ And upon the same subject it is remarked by another elementary writer: “The husband’s remedy against the seducer of his wife may be in trespass, or by an action on the case. The latter is preferable, where there is any doubt whether the fact of adultery can be proved, and there is a ground of action for enticing away or harboring the wife without the husband’s consent; because a count for the latter offence may be joined with the former; and a count in trover for wearing apparel, &c., may be added.”⁴

§ 18. Evidence must be given of a *marriage in fact*. (a) Cohabitation, reputation, or other circumstances from which it may be inferred only, do not amount to evidence of an actual marriage.⁵ But evidence of a marriage *de facto* and cohabitation, followed by proof of criminal intercourse, between the defendant and a woman who passed for the plaintiff’s wife, is sufficient to go to a jury, without absolute proof of the identity of the former woman and the latter.⁶

§ 19. In this action, as upon applications for divorce, where the point has most frequently been raised, direct evidence is not necessary to prove the fact of adultery. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.⁷ Admissions are competent evidence.⁸

¹ Rigaut v. Gallisard, 7 Mod. 78, 82.

² 1 Chit. Pl. 139.

³ 1 Chit. Pl. 164.

⁴ 2 Greenl. Ev. § 40, n.

⁵ Morris v. Miller, 4 Burr. 2057, 2059.

See Com. v. Belgard, 5 Gray, 96.

⁶ Hemmings v. Smith, 4 Doug. 33.

⁷ Loveden v. Loveden, 2 Hagg. Con. 2, 3. See Mosser v. Mosser, 29 Ala. 313; State v. Marvin, 35 N. H. 22.

⁸ State v. Medbury, 8 R. I. 543.

(a) This rule, however, is often changed by express statute. See Richardson v. State, 34 Tex. 142.

General cohabitation is of itself sufficient proof.¹ And where criminal intercourse is once proved, it will be presumed to continue while the parties remain under the same roof.² So adultery may be proved, on the part of the wife, by birth of a child, the husband being out of the realm. Or, in the case of the husband, by the birth, maintenance, and acknowledgment of a child.³ Or by his visiting a known brothel, more especially if he remain alone for some time in the room with a prostitute.⁴ (a)

§ 20. It is held a good defence, that the parties have separated by agreement, the husband relinquishing all claim to the person of the wife.⁵ Although *recrimination* is a good bar to divorce for adultery, it is very doubtful whether the defence is allowable in an action for damages; though it may go in mitigation of damages.⁶ *Collusion*, *sufferance*, or *connivance*, is a defence. But not mere negligence, confidence, or lack of observation; which, however, as well as loose and improper conduct of the husband, may go in mitigation of damages. But not that the plaintiff is ill-tempered, and that, previously to the illicit intercourse charged, he and his wife lived unhappily, and occasionally came to blows. The connivance may apply to mere improper familiarity, if almost amounting to proximate acts, and more especially to habitually criminal conduct, though with others than the defendant.⁷ (b)

¹ Cadogan v. Cadogan, cited in 2 Hagg. Con. 4, n.

² Turton v. Turton, 3 Hagg. Ecc. 350.

³ Richardson v. Richardson, 1 Hagg. Ecc. 6; D'Aguilar v. D'Aguilar, Ib. 777, n. See Harding v. Harding, 22 Md. 337.

⁴ Astley v. Astley, 1 Hagg. Ecc. 720.

⁵ Chambers v. Caulfield, 6 E. 244; Wilton v. Webster, 7 C. & F. 198; Weedon v. Timbrell, 5 T. R. 357.

⁶ Beeby v. Beeby, 1 Hagg. Ecc. 789;

Bromley v. Wallace, 4 Esp. 237; Wyndham v. Wycombe, Ib. 16.

⁷ Van Vacter v. M'Killip, 7 Blackf. 578; Pierce v. Pierce, 3 Pick. 299; Hodges v. Windham, Peake, Cas. 39; Rogers v. Rogers, 3 Hagg. Ecc. 58; Crewe v. Crewe, Ib. 128; Moorsum v. Moorsum, Ib. 95; Foley v. Peterborough, 4 Doug. 294; Smith v. Alison, Bull. N. P. 27; 2 Greenl. Ev. § 51; Bunnell v. Greathead, 49 Barb. 106.

(a) On application for divorce, where the husband married another woman, and they occupied the same house and bed together for several days; held, sufficient evidence of adultery; and the court refused to hear the testimony of the woman and of a physician, offered to prove that he did not have, and was not capable of having, sexual connection with her. Clapp v. Clapp, 97 Mass. 531.

Where, upon a bill for divorce on the ground of adultery, the direct evidence, though insufficient of itself, was sustained by the proved habits and character of the accused, and also the strong probability of corroborative facts: held, the complainant was entitled to a decree. Adams v. Adams, 2 Green (N. J.), 324.

Proof of an adulterous intercourse between parties, maintained during a period prior to that in issue, is competent to explain the intent of familiarities of a doubtful character indulged during the period laid. It may warrant the jury in finding such familiarities to be evidence that the adultery was still continued. Lockyer v. Lockyer, 1 Edm. Sel. Cas. 107.

In an action of *crim. con.*, an improper intimacy having been shown for over a year prior to a separation between plaintiff and his wife, evidence of subsequent intimacy is admissible to interpret previous conduct. Sherwood v. Titman, 55 Penn. 77.

(b) In an action for *crim. con.*, it was

§ 21. Upon the question of *damages*, the relation of the plaintiff to his wife, the circumstances of their domestic life, &c., may be shown. Also the relation between the plaintiff and defendant. And these facts may be proved by the conversation, correspondence, and general deportment of the parties.¹

§ 22. It was formerly held, that no action for criminal conversation could be brought for any act of adultery committed after a *separation* between husband and wife.² But the authority of this decision has been questioned, and it has been since decided, that, where a husband and wife entered into a deed, with a provision that in a certain event, and upon the consent of the trustees, the wife should be permitted to live separate, and she did live separate, from her husband, but without the consent of the trustees, and then committed adultery; the husband might bring an action for criminal conversation against the adulterer. More especially as the deed contained a proviso, in case of such separation, for the attendance and care of the mother to her children, whereby the husband did not give up all claim to the comfort and assistance of the wife.³

§ 23. In general, a husband may maintain an action for *enticing away* his wife, or inducing her to live apart from him, even against the wife's father. And in such action it is held sufficient to state, that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion she did continue absent, &c., whereby the plaintiff lost the company and society of his wife," without setting forth the means used by the defendant.⁴ A complaint is good on demurrer, that the defendant wickedly and wrongfully, &c., contrived to alienate the affections of the plaintiff's wife from him, and persuaded and induced her to refuse to acknowledge and receive him as her husband, whereby he had wholly lost, and been deprived of, the comfort, fellowship, society, aid, and assistance of his wife in his domestic affairs.⁵ Evidence of a report that the plaintiff ill-treated his wife is not admissible in justification. Nor are her mere statements of such treatment any justification. It must be proved.

¹ 2 Greenl. Ev. § 55.

² Weedon v. Timbrell, 5 T. R. 357.

³ Chambers v. Caulfield, 2 J. P. Smith, 356; 6 E. 244.

⁴ Winsmore v. Greenbank, Willes, 577. See Ferguson v. Tucker, 2 H. & G. 182; Gilchrist v. Bale, 8 Watts, 355.

⁵ Heermance v. James, 47 Barb. 120.

ruled, that, if the wife was a prostitute "with the knowledge or acquiescence" of her husband, he could not recover. The defendant claimed the language

should have been "by the passive suffering or connivance of the husband." Held, there was no real difference. Sherwood v. Titman, 55 Penn. 77.

The party is liable to an action, unless she was justifiable in leaving her husband.¹ But it is held that an action cannot be maintained without proof of improper motives.² More especially against the father of the wife.³ And a father, whose daughter was married, against his will, to a man who at the time of the marriage was and ever since had been an habitual drunkard, whose habits of drunkenness were one ground of objection on the part of the parents to the marriage, who had been, since the marriage, in the habit of frequenting houses of ill-fame, and boasted of his intercourse with lascivious and lewd women, and who had no means of supporting a family, and was lazy, thriftless, and idle; has the right to receive her into his home, and even advise her to leave her husband, and no action can be maintained against him, under these circumstances, for enticing her away.⁴ So a third person may sometimes *harbor* a wife, when he would not be justified in advising her to leave, or carrying her away from the husband.⁵ And one permitting his wife's mother to reside in his house, and affording her the rights of hospitality, although forbidden by the husband of the mother, is not liable to the action of the husband for illegally harboring his wife.⁶ (a)

¹ Barnes v. Allen, 30 Barb. 663.

⁴ Bennett v. Smith, 21 Barb. 439.

² Schoraieinan v. Palmer, 4 Barb. 225.

⁵ Barnes v. Allen, 30 Barb. 663.

³ Hutcheson v. Peck, 5 John. 196.

⁶ Turner v. Estes, 3 Mass. 317.

(a) As to an action by the wife for enticing away and harboring her husband, see Clark v. Harlan, 1 Cinc. 418.

CHAPTER XLIII.

PARENT AND CHILD.

- | | |
|--|---------------------------------------|
| 1. Seduction; founded on the presumption of service. | 7. Form of action. |
| 3. In case of children under age. | 8. Defence. |
| 4. Children of age. | 10. Damages. |
| 5. Loss of service; proof and nature of. | 12. Enticing away, or abduction. |
| 6. By whom the action may be brought. | 13. Other injuries to minor children. |
| | 15. Infants. |

§ 1. CHIEF among the injuries connected with the relation of parent and child,¹ is that of *seduction*. (a)

¹ See *People v. Turner*, 55 Ill. 280; *Wishard v. Medaris*, 34 Ind. 168.

(a) See *Pence v. Dozier*, 7 Bush, 133. The word "seduce," when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and it is not necessary, in an information for the crime of seduction, to charge the offence in any other language. And although a statute uses the terms "seduce and commit fornication," yet the word "seduce," *ex vi termini*, implies the commission of fornication. *State v. Bierce*, 27 Conn. 319.

In an action for seduction, it is no ground of nonsuit, that by the plaintiff's evidence the offence was *rape* and not seduction. Whether it was so or not, is a question for the jury on the evidence. *Furman v. Applegate*, 3 Zab. 28. See *Fox v. Stevens*, 13 Minn. 272. And the use of force does not disprove seduction. *Damon v. Moore*, 5 Lans. 454.

More recent cases are as follows:—

The defendant must have used insinuating arts to overcome the opposition of the seduced, and must by his wiles and persuasions, without force, have debauched her. *Hogan v. Cregan*, 6 Rob. 138.

The two following instructions, taken together, were held not to be erroneous: "If an unmarried man, having by his visits and attentions to an unmarried female, gained her affections and confidence, importunes her to sexual intercourse with him, and she through her confidence in him and love for him yields to his solicitations, it is seduction." "If an unmarried man solicits sexual inter-

course with an unmarried female, and she yields through the promptings of her own lascivious and lecherous desires, it is not seduction, such as will entitle her to recover damages in her own right, though a child be begotten by the connection." *Bell v. Rinker*, 29 Ind. 267.

In a prosecution for seduction under (Wis.) Rev. Sts. c. 170, § 5, it is error to instruct the jury, that, "if the woman ultimately consented to the illicit intercourse, the crime was seduction, although she consented partly through fear and partly because the defendant hurt her;" it was more atrocious than seduction. *Croghan v. State*, 22 Wis. 444.

Upon the plea of not guilty, the court are bound, if so requested, to instruct the jury, that criminal connection may take place between the parties without seduction; and that, if seduction was not proved, damages for it should not be given. *Hill v. Wilson*, 8 Blackf. 123.

Pregnancy is the ordinary injurious result, which furnishes the ground of action. But an action also lies for communicating to a daughter the venereal disease, which disabled her from labor. *White v. Nellis*, 31 N. Y. (4 Tiff.) 405. But see *Abrahams v. Kidney*, 104 Mass. 222.

A minor daughter, residing with her father, and engaged as a school-teacher under an agreement made with him, was seduced, became pregnant, and died suddenly about four months after conception. A post-mortem examination disclosed a dead fœtus, and a congested brain, caused, as it was supposed, by ner-

§ 2. Upon this subject the rule is well established, that, while an action for seduction cannot be maintained in the name of the female who has been seduced,¹ (a) the father may maintain an action of seduction, when the relation of *master and servant* exists, in fact or by construction and by right, at the time of the seduction; but not otherwise.² (b) And such relation must be set forth in the declaration.³ But, though the daughter receives part of her wages, and is under age, yet, if she is not the servant of the father, he cannot maintain the action.⁴

§ 3. After the majority of the daughter, the father may maintain an action for her seduction, while a minor.⁵ And the relation of master and servant exists *constructively* between a father and his *infant* daughter, so that he may sue for her seduction, although she is actually in the service of another for wages, provided the father has not relinquished his parental control, and has at any time a right to reclaim her services.⁶ Or though she has left her father's house with his consent, without intending to return, and with his license to appropriate her time and services to her own use.⁷ Thus the plaintiff's daughter, who had formerly been in

¹ Hamilton v. Lomax, 26 Barb. 615.

² Sutton v. Huffman, 3 Vroom, 58; Mulvehall v. Millward, 1 Kern. 343; Ingersoll v. Jones, 5 Barb. 661; 11 Geo. 603; 14 Ala. 235; 1 J. P. Smith, 373.

³ Lee v. Hodges, 13 Gratt. 726.

⁴ Carr v. Clarke, 2 Chit. 260; M'Daniel v. Edwards, 7 Ired. 408.

⁵ Stevenson v. Belknap, 6 Clarke (Iowa), 97.

⁶ Bolton v. Miller, 6 Ind. 262; 14 Ala. 235; 11 Geo. 603; Greenwood v. Greenwood, 28 Md. 369.

⁷ Boyd v. Byrd, 8 Blackf. 113.

vous excitability or extreme mental agitation. Held, she must have been in no condition for ordinary physical exertion for weeks prior to her death, and such condition was the direct consequence of her seduction; therefore the facts clearly gave the father a right of action against the seducer. Ingerson v. Miller, 47 Barb. (N. Y.) 47.

(a) Contrary to the general rule, that a female cannot herself maintain an action for seduction, being *in pari delicto*; the following case recently occurred in Connecticut. An action was brought upon a note, by a girl under age, by her next friend, in which the declaration alleged, that the defendant, fraudulently, and with the intention of getting her within his power for purposes of prostitution, she being then but fourteen years of age, destitute, without relatives, and in the care of a charitable society in New York, represented to her, and to the persons who had her in charge, that he wanted her to go to his house in this

State, and live in his family as a servant, and that he was a suitable person to take charge of her for that purpose; and that, with the advice of her friends, she came to his house with him for the purpose, and that, while she was living in his house, the defendant, by taking advantage of her ignorance and dependence, and want of friends, and of her fear of him, persuaded her to submit to carnal intercourse with him, and that he thus debauched her and ruined her character and prospects in life, and in settlement for this injury the note was given. Held, the action would lie, and the declaration was good on demurrer. Smith v. Richards, 29 Conn. 232.

(b) Where, at the time the seduction occurred, the person seduced was at service in another family, the judge may submit to the jury to determine, whether the plaintiff was at the time entitled to the wages of the person seduced. Ingersoll v. Jones, 5 Barb. 661.

the defendant's service, and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month, to attend to his business during the absence of his wife; and the defendant promised, before she went, to pay her something for so doing, and, when she left, the defendant's wife gave her eight shillings. During the time she so resided with the defendant, he seduced her. Held, the above facts were not inconsistent with the relation the daughter held, of servant to the plaintiff, and that an action for her seduction was maintainable by him.¹ So a father, liable for the expenses of the lying-in of his minor daughter, though she has been permitted to leave his house, and was *de facto* the servant of another person, and he had relinquished all claim to her services, and though he has actually paid nothing; may maintain an action for the seduction.² So a daughter, of the age of nineteen years, with the consent of her father, went to live with her uncle and aunt, for whom she worked when she pleased, and the uncle agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While in the house of her uncle she was seduced and got with child, and immediately after returned to her father's house, where she was maintained, and the expenses of lying-in paid by him; though she had no intention, under other circumstances, of returning to live with her father. Held, an action on the case, *per quod servitium*, &c., was maintainable by the father; he not having divested himself of the power to claim her services; and the relation of master and servant being presumed, from his right to her service, arising from his liability to maintain and provide for her while under age.³ But, to sustain an action for seduction, it is necessary to show something like the relation of master and servant, however slight the degree. Thus, a father, who has bound his daughter to another man as a servant, being no longer entitled to her services, cannot maintain an action of seduction against him.⁴ (a) Nor will the action lie, where the daughter does not reside in the father's

¹ Griffiths v. Teetgen, 28 Eng. L. & Eq. 371; 15 Com. B. 344.

² Clark v. Fitch, 2 Wend. 459.

³ Martyn v. Payne, 9 Johns. 387; acc.

Dean v. Peel, 5 E. 45; Davies v. Williams, 10 Ad. & Ell. N. S. 725. See Kilby v. Stanton, 2 Y. & J. 75.

⁴ Dain v. Wycoff, 3 Seld. 191.

(a) Under the (Md.) Code, art. 6, § 20, providing that any father may bind out his child as an apprentice "for any time not longer than the full age of such child, that is to say, boys till twenty-one and

girls till eighteen years of age," a female child is not to be considered as of full age at eighteen, so as to affect the right to an action for her seduction. Greenwood v. Greenwood, 28 Md. 369.

family, and has no intention of returning to it, although she is not residing as a hired servant elsewhere.¹ So a parent cannot maintain an action for the seduction of a daughter, who lives as a domestic servant in the house of her master, although with his permission she is in the habit, during her leisure time, of assisting in the work by which her parent earns his livelihood.² So where the daughter rented a house, and carried on the business of a milliner at the time of her seduction; the circumstance of her mother and the younger branches of her family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), does not constitute such "services," as to entitle the father to maintain the action.³ So where a daughter, at the age of eight or nine years, left the residence of her mother, at the suggestion of friends, because the mother was a common prostitute, and went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by him, and left the State with him, and went to Louisiana, where she was delivered of a child; and, from the time she left her mother's house, there was no intercourse between the mother and daughter; and the mother continued a prostitute: held, that the mother could not maintain an action for seduction.⁴

§ 4. A father may also maintain an action for the seduction of his daughter, whether over twenty-one or not, provided she is in his service at the time of her seduction.⁵ (a) As, if she is living with her father,⁶ and under his control; though there is no express contract for services between them. Such contract will be presumed from any services, however slight, rendered by her in the family.⁷ Thus, where a daughter, twenty-nine years of age, resides with her father, and, by a tacit understanding, continues to render certain services, and is supplied by him with food and

¹ 1 J. P. Smith, 333.

² *Thompson v. Ross*, 5 Hurl. & Nor. 16.

³ *Manly v. Field*, 7 C. B. N. S. 96.

⁴ *Roberts v. Connelly*, 14 Ala. 235.

⁵ *Keller v. Donnelly*, 5 Md. 211; *Sutton v. Huffman*, 3 Vroom, 58; *Millar v. Thompson*, 1 Wend. 447; *Nicholson v.*

Stryker, 10 Johns. 115. See *Parker v. Meek*, 3 Sneed, 29; *Lipe v. Eisenlerd*, 32 N. Y. 229.

⁶ *Booth v. Charlton*, cited in 5 E. 47; 11 Geo. 603.

⁷ *Kendrick v. McCrary*, 11 Geo. 603; *Moran v. Dawes*, 4 Com. 412.

(a) Testimony of what took place between the daughter and her seducer, after the former was twenty-three years of age, is not admissible to show loss and deprivation of society, but may be ad-

mitted to explain and illustrate what took place between the parties five years previously. *Keller v. Donnelly*, 5 Md. 211.

clothing; an action lies for her seduction, though she is at the time absent.¹ So a father may maintain trespass for the seduction of his daughter and servant, whom he maintains, in consideration of her services, though she be a married woman.² But a father cannot maintain an action of trespass, for assaulting and debauching and getting his daughter with child, *per quod*, &c., where the daughter is above the age of twenty-one years; unless she is actually in his service.³ Thus the action does not lie, where the daughter was at the time of seduction in the service of another person;⁴ unless, during some portion of her pregnancy or lying-in, she is a member of the parent's household.⁵ Nor where a daughter lived away from her father's house, under a contract made by herself after she became of age, and received to herself the benefit.⁶

§ 5. For the reason above stated, that this action is founded upon the relation of master and servant, no action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless on the ground of the loss of service.⁷ But a parent may maintain an action for the seduction of his daughter over twenty-one years of age, where the daughter renders services to the parent which are interrupted by the seduction; though such service be very slight.⁸ Or, as has been held, if she became, in consequence, incapacitated in any material degree for rendering any services which the plaintiff might lawfully demand of her.⁹ And, though there be no express contract for services, a contract will be presumed from any services, however slight, rendered by her in the family.¹⁰ And the general rule is laid down, that in an action for seduction, brought by the parent, who has a right to the service of the daughter, if the seduction is proved, the loss of service will be presumed, and need not be proved.¹¹ Especially, as is held, if the daughter is a minor, residing with her father, and he has a right to claim her services.¹² So the action may be maintained by a step-father for the seduction

¹ *Lipe v. Eisenlerd*, 32 N. Y. (5 Tiffa.) 229.

² *Harpur v. Luffkin*, 1 Man. & Ry. 166.

³ *Nickleston v. Stryker*, 10 Johns. 115; *Patterson v. Thompson*, 24 Ark. 55.

⁴ *Postlethwaite v. Parkes*, 3 Burr. 1878.

⁵ *Parker v. Meek*, 3 Sneed, 29.

⁶ *Lee v. Hodges*, 13 Gratt. 726.

⁷ *Satherthwaite v. Duerst*, 4 Doug. 315.

⁸ *Vossell v. Cole*, 10 Mis. 634; 11 Geo. 603; 15 Barb. 279.

⁹ *Knight v. Wilcox*, 15 Barb. 279. Reversed, 14 N. Y. 413.

¹⁰ *Kendrick v. McCrary*, 11 Geo. 603.

¹¹ *Anderson v. Ryan*, 3 Gilm. 583; *Bartley v. Richtmyer*, 2 Barb. 182.

¹² *Hewitt v. Prime*, 21 Wend. 79. See *Lee v. Hodges*, 13 Gratt. 726.

of a step-daughter, who had been taken into his house, and brought up as one of his own children, and in relation to whom he had assumed the place of a father and a protector: where the female seduced was nursed and provided for, during her confinement, by the plaintiff's wife, and the expenses of her lying-in were borne by the plaintiff; although at the time of her seduction she resided in the family of another person.¹

§ 6. An action may be sustained, not only by a parent, but by a guardian, master, or other person, standing *in loco parentis* to the person seduced. If such person is a minor and legally under the control of, or required to render service to, the plaintiff; the action will be sustained, whether she resided with him or elsewhere. If not a minor, she must reside with and render service to him, but slight acts of service will sustain the action.² Thus a step-father, who has adopted the illegitimate daughter of his wife into his family, stands *in loco parentis*, and can maintain an action for her seduction.³ So the mother of a minor child, after the father's decease, though temporarily in the employment of another person, with the assent of the mother and as a means of support.⁴ So an action may be brought by a mother against the seducer of her daughter, who had been bound as an apprentice, but, the indentures being cancelled, had returned to the plaintiff's house, and there given birth to a child.⁵ So, until a girl is eighteen, her mother, when left her natural guardian, is entitled to her services, unless the girl is apprenticed to some trade; and if, before that age, she be debauched, the mother may maintain an action against her seducer, if the girl was in her service at the time. But a mother is not entitled to the services of her daughter after she is eighteen years of age, nor can she maintain an action for her seduction after that age, unless in her employ. Otherwise, if induced to leave her before she is eighteen, and then seduced.⁶ Nor can a mother maintain an action for the seduction of her daughter in the life-time of the father, although the child was not born till afterwards.⁷ Nor can an action be maintained by a mother, after the death of her husband, for the seduction of her daughter in his lifetime, where, at the time of the seduction, the daughter was over twenty-one years of age, and was residing with her brother at his residence,

¹ Bartley v. Richtmyer, 2 Barb. 182.

² Ball v. Bruce, 21 Ill. 161.

³ Bracy v. Kibbe, 31 Barb. 273.

⁴ Gray v. Durland, 50 Barb. 100;
Felkner v. Scarlet, 29 Ind. 154.

⁵ Sargent v. —, 5 Cow. 106.

⁶ Keller v. Donnelly, 5 Md. 211.

⁷ Vossell v. Cole, 10 Mis. 634.

and taking charge of his family; although she shortly afterwards returned to her mother's house, and remained there till after her confinement, and was taken care of by her.¹ And the executors and administrators of a deceased father cannot maintain an action for the seduction of his daughter in his lifetime.²

§ 7. With regard to the form of action for this injury, the complaint need not aver previous chastity.³ It is sometimes held, that an action for debauching the plaintiff's daughter, *per quod servitium amisit*, is an action of *trespass*; and therefore a count thereon may be joined with a count for breaking and entering the house.⁴ But *an action on the case* always lies by a master for the seduction of his servant, even where by the proof *trespass* could in the particular case have been sustained.⁵ Though such action is not maintainable, unless laid with a *per quod servitium amisit*.⁶ This is the gist of the action. And the distinction is made, that this action may be maintained by the party on whom such damages have fallen. Therefore, where a party seduced lived with her father at the time of seduction, but after his death lived with her mother, by whom the trouble and expense of her lying-in was sustained; it was held, that the latter might maintain this action. It would be otherwise with the action of *trespass vi et armis*, the gist of which being the illegal entry, it could only be maintained by the father.⁷

§ 8. It is a good defence to an action by a father for the seduction of his daughter, that his own misconduct, by way of connivance, co-operated with the defendant's to produce the wrong.⁸ And mere negligence may be shown to mitigate damages.⁹

§ 9. But it is not competent for the defendant to show, that the daughter consented willingly to the seduction, or even that she in fact seduced the defendant, her consent not depriving the plaintiff of his right of action.¹⁰ A subsequent marriage between the seducer and seduced, and an acquittal of the former on an indictment for seduction, do not, either alone or together, constitute a complete

¹ *George v. Van Horn*, 9 Barb. 523.

² *Ibid.*

³ *Bell v. Rinker*, 29 Ind. 267.

⁴ *Woodward v. Walton*, 2 New R. 476.

⁵ *Furman v. Applegate*, 3 Zab. 28;

Ream v. Rank, 3 S. & R. 215; *Moran v. Dawes*, 4 Cow. 412.

⁶ *Satherthwaite v. Duerst*, cited in 5 E. 47, n.

⁷ *Parker v. Meek*, 3 Sneed, 29.

⁸ *Travis v. Barger*, 24 Barb. 614; *Hollis v. Wells*, 3 Penn. L. Jour. 169; *Rea v. Tucker*, 51 Ill. 110; *Graham v. Smith*, 1 Edm. Sel. Cas. 267; *Vossell v. Cole*, 10 Mis. 634. See *Fletcher v. Randall*, Anth. N. P. 196.

⁹ *Graham v. Smith*, 1 Edm. (N. Y.) Sel. Cas. 267.

¹⁰ *M'Aulay v. Birkhead*, 13 Ired. 28.

bar to the father's right to recover, but they go to mitigate the damages.¹

§ 10. It is held that the plaintiff, to show the nature of the injury and increase the damages, may prove that the defendant promised to marry the daughter, and by that means had succeeded in debauching her.² But the jury must not award to the father any part of the damages which belong to the daughter, by reason of the breach of contract of marriage.³ And the distinction has been made, that the plaintiff cannot give evidence of such promise; although he may prove, in showing the circumstances under which the seduction took place, that the defendant addressed her with honorable proposals.⁴

§ 10 *a*. Evidence of previous chastity is admissible, as affecting the question of damages.⁵ So, where there is a question whether the defendant did seduce the daughter, raised by the contradiction between her testimony and his evidence of her previous unchaste conduct, as tending to corroborate his evidence, as well as in mitigation of damages.⁶ Evidence is admissible, of procuring abortion.⁷ In a late case, evidence of the daughter, as to the defendant's promises to her during his guilty visits, was held admissible in aggravation of damages; also as to propositions to procure an abortion. So the following question and answer were relevant and proper: "Did the defendant at any time ask you to marry his son?" "After he had connection with me, and before I was in the family way, he said if I would marry his son he would never say any thing about it, and it would never be found out, and wanted to know if his son had made me any offer to marry me; I said no; he wanted to know if I was engaged, and if not, he would encourage the visits of his son." So the testimony of the plaintiff, that the defendant had been influential in procuring him the position of chairman of the town board; to show the relations and confidence existing between the parties, and to rebut the defendant's claim, in mitigation of damages, that the plaintiff had been negligent, &c., as to his daughter.⁸ After evidence tending to show seduction, all evidence tending to furnish data for exemplary damages should

¹ *Eichar v. Kistler*, 14 Penn. 282.

² *White v. Campbell*, 13 Gratt. 573; 20 Penn. 354.

³ *Phelin v. Kenderdine*, 20 Penn. 354.

⁴ *Whitney v. Elmer*, 60 Barb. 250; *Brownell v. McEwen*, 5 Denio, 367; *Gillet v. Mead*, 7 Wend. 193. See *White v. Campbell*, 13 Gratt. 573.

⁵ *Bell v. Rinker*, 29 Ind. 267.

⁶ *Hogan v. Cregan*, 6 Rob. 138. See *State v. Shean*, 32 Iowa, 88; *State v. Sutherland*, 30 Iowa, 570; *Threadgood v. Litogot*, 22 Mich. 271.

⁷ *Klopfer v. Bromme*, 26 Wis. 372.

⁸ *Fox v. Stevens*, 13 Minn. 272.

also be received. Thus expenses of medical and lying-in attendance, though the daughter was over twenty-one years of age.¹ The following instruction was held to be strictly accurate: "If the jury find for the plaintiff, besides the loss of services and the disbursements for medical treatment and other necessary expenses, they can give such additional damages for wounded feelings, mental suffering, and for the dishonor of the plaintiff and his family, as they shall deem from the evidence to be a reasonable and just compensation therefor, not exceeding, in all, the amount claimed in the complaint."² Evidence of acts of unchastity, on the part of a woman seduced, two months subsequent to the date of the act charged, is not admissible for the defendant.³ The fact, that another person had had intercourse with the person seduced before her alleged seduction by the defendant, when this had remained unknown to the defendant as well as to the public at the time of the seduction, is not to be considered by the jury in mitigation of damages.⁴ At the trial of an action for the seduction of the plaintiff's daughter, the defendant offered to prove, that the person seduced, who, as a witness for the plaintiff, had denied being engaged to one J. S., had previously stated the contrary. Held, that such testimony was inadmissible as being immaterial, even had a foundation been laid for impeaching questions.⁵

§ 11. It is held that *exemplary damages*, beyond the mere loss of service and payment of necessary expenses, may always be allowed in actions on the case for seduction; whether the suit be brought by a parent or other person suing as master.⁶ As in case of an *adopted* daughter.⁷ Pregnancy and the birth of a child are not essential;⁸ but it is not sufficient if the illness of the daughter, whereby she was unable to labor, was produced by shame for the seduction, and would not have occurred but for shame caused by the exposure.⁹ It has been held, but strongly doubted on appeal, that the jury in assessing damages may take into view the wounded feelings of the plaintiff, and not only recompense him, but punish the defendant according to the aggravation of the offence.¹⁰ They may award him compensation for the destruction of his domestic

¹ Hogan v. Cregan, 6 Rob. 138.

² Fox v. Stevens, 13 Minn. 272.

³ Mann v. State, 34 Geo. 1.

⁴ Lea v. Henderson, 1 Cold. 146.

⁵ Fisher v. Hood, 14 Mich. 189.

⁶ Ingersoll v. Jones, 5 Barb. 661; Irwin v. Dearman, 11 E. 23. See Klopfer v. Bromme, 26 Wis. 372; Felkner v.

Scarlet, 29 Ind. 154; Bartley v. Richtmyer, 4 Comst. 38.

⁷ 11 E. 23.

⁸ Knight v. Wilcox, 18 Barb. 212.

See Stiles v. Tilford, 10 Wend. 338.

⁹ Knight v. Wilcox, 4 Kern. 413.

¹⁰ Knight v. Wilcox, 18 Barb. 212; doubted in S. C. 4 Kern. 413.

peace, as well as the disgrace cast upon his family.¹ Or for all that he can feel from the nature of the injury.² And a plaintiff may show in aggravation of damages any circumstances, the natural consequences of the principal act, although they did not transpire until after suit brought.³ So, in trespass for debauching the plaintiff's daughter, the standing and condition in life of the parties may be given in evidence.⁴ So it is held, that he may prove the character of his own family, and the pecuniary circumstances of the defendant.⁵ If the conduct of the daughter has been lewd, the damages will be strictly limited to the loss of service during pregnancy.⁶

§ 12. An action will lie for *enticing away* the plaintiff's servant, his daughter, though it is not alleged that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff. As where the plaintiff's daughter, nineteen years old, resided with him and assisted him in his business, and by a fictitious letter, dictated by the defendant, she procured her mother's consent to leave home for a few days, when she left, and the defendant took her to a lodging-house, where he cohabited with her for nine days, and she then returned home.⁷

§ 12 *a*. And, in general, an action lies for the *abduction* of a child from its parent. Thus the plaintiff had a verdict for damages, in an action of trespass *vi et armis*, for the abduction of his daughter, who was under twenty-one years of age; and, on motion in arrest of judgment, the action was held to be maintainable, although it was not laid in the declaration that thereby the plaintiff lost the services of his child, and although there was no evidence of a forcible taking.⁸ But a father who lives apart from his wife, and suffers his son, a minor, to remain under the custody and care of the wife, to be supported and employed by her, or allows such son to go from him, and employ himself as he pleases, and take his wages; cannot maintain an action against a third person, on a declaration that the defendant enticed and carried away the son from the plaintiff's own care and custody. And where a minor, thus left to the care of his mother, or thus allowed to employ himself, ships for a voyage to sea at the request of the mother; the

¹ Kendrick v. McCrary, 11 Geo. 603.

² Phelin v. Kenderdine, 20 Penn. 354.

³ Hewitt v. Prime, 21 Wend. 79.

⁴ Keplinger v. Sherrick, Wright, 104;

Rea v. Tucker, 51 Ill. 110.

⁵ McAulay v. Birkhead, 13 Ired. 28.

⁶ Fletcher v. Randall, Anth. N. P. 196 and n.

⁷ Evans v. Walton, L. R. 2 C. P. 615.

⁸ Kirkpatrick v. Lockhart, 2 Brev. 276.

father cannot, by forbidding the ship-owner to take the son to sea, entitle himself to maintain an action against the ship-owner on such declaration.¹ Nor can a father maintain an action against one who procures the marriage of his daughter, if the daughter in good faith, and without force or imposition, enter into the marriage contract, when between twelve and fourteen years of age.²

§ 13. In reference to other claims and liabilities, as well as that for seduction, the relation of parent and child, though the latter lives with, and is under the control of its father, does not necessarily constitute the relation of master and servant; without which an action cannot be maintained by the father, but only by the child.³ It is held that a parent cannot maintain an action for retaining a child from him. *Habeas corpus* is the only remedy.⁴ So it has been held, that a father cannot maintain trespass for an injury to a child only two years and a half old, "*per quod servitium amisit*;" as the child is incapable of performing acts of service.⁵ More especially a parent, suffering his infant child to play unattended in the streets, cannot recover damages for the injury of the child by the wagon of one engaged in his lawful business, and guilty of no negligence.⁶ So where a minor left his father's service, and went to a port where he was a stranger, and there shipped as of full age, for a whaling voyage, during which he perished; it was held, that the father could not maintain an action for the loss of the services and society of the son, arising from his death, unless the person who shipped him knew that he was a minor.⁷ But other cases hold, that trespass lies by a father, for a forcible injury to his son, *per quod*, &c.⁸ So if a legitimate infant child, a member of his father's household, though too young to be capable of rendering any services to his father, is wounded or otherwise injured, by a third person, or by a mischievous animal owned by a third person, under such circumstances as give the child himself an action against such person, for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child; he may maintain an action against such person for an in-

¹ Wodell v. Coggeshall, 2 Met. 89.

² Goodwin v. Thompson, 2 Greene, 329.

³ 15 Ind. 73.

⁴ Dowling v. Todd, 26 Mis. 267.
(Under what circumstances this may be maintained, see The People v. Olmstead, 27 Barb. 9.)

⁵ Hall v. Hollander, 7 Dowl. & Ry. 133; 4 B. & C. 660. See Magee v. Holland, 3 Dutch. 86.

⁶ Kreig v. Wells, 1 E. D. Smith, 74.

⁷ Cutting v. Seabury, Sprague, 522.

⁸ Hammer v. Pierce, 5 Harr. 304.

demnity.¹ And the owner of a dog that injures a minor child, so that the parent, by reason of such injury, loses the child's services, and is put to expense for his cure, is liable to the parent, under Rev. Sts. of Massachusetts, c. 58, § 13, for double the damages by him thus sustained.² More especially a father may sue in case for an injury done to an infant child (then living with him and engaged in his service) by dogs, permitted by the defendant to run at large, after knowledge that such dogs were accustomed to bite mankind.³ So the father of a minor daughter, living with, and performing labor for him, may, under the provisions of the Rev. Sts. of Maine, c. 26, maintain an action for damages sustained by him in the loss of her services, occasioned by an injury caused by a collision on the highway, which was owing to the defendant's negligence and misconduct, by means of which collision the daughter was thrown from her father's wagon.⁴ So in an action on the case for harboring the plaintiff's minor son, if the defendant, knowing that the son had run away from his father, board him in his family, and allow him to work on his farm as he pleases, and do this with the intention of aiding or encouraging, or with the knowledge that it aided or encouraged the son to keep away from the father; he is liable to the action.⁵ (a)

¹ *Dennis v. Clark*, 2 Cush. 347; 7 Dowl. & Ry. 133. See *Mercer v. Jackson*, 54 Ill. 397.

² *McCarthy v. Guild*, 12 Met. 291.

³ *Durden v. Barnett*, 7 Ala. 169. See *Arnold v. Norton*, 25 Conn. 92.

⁴ *Kennard v. Burton*, 25 Me. 39.

⁵ *Sargent v. Mathewson*, 38 N. H. 54. See *Caughey v. Smith*, 47 N. Y. 244.

(a) In Missouri, an action by a father against a common carrier, for damages arising from the death of his son, which was occasioned by the defendant's negligence, survives to the plaintiff's representatives; but damages are limited to the actual value of the son's services to the estate. *James v. Christy*, 18 Mis. 162.

Where, upon a decree of divorce, the custody of a child of four years of age was assigned to the mother, and the father afterward, with a strong hand, seized the child, then in the mother's custody, and against her will, and carried it out of the State; held, this constituted the statute offence of unlawfully and forcibly carrying the child out of the State, and it was not necessary to prove expressly that it was done without its consent, inasmuch as in law the child was incapable of consent. *State v. Farrar*, 41 N. H. 53.

Recent statutes often provide an action by a father for injury resulting from the death of his son. But such an action cannot be maintained, without some evidence of actual pecuniary damage. 4 Hurl. & Nor. 653. See *Whitford v. Panama, &c.*, 23 N. Y. (9 Smith), 465.

Where the father was old and infirm, and the son, who was young, and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week; the jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life, it was held that the action was maintainable. *Franklin v. South-eastern, &c.*, 3 Hurl. & Nor. 211.

In an action, on the 9 and 10 Vict. c. 93, by a father, for injury resulting from the death of his son, it appeared that the father was a working mason, and that the son was a boy of fourteen years of

§ 14. The parent of a child, expelled from a public school, cannot maintain an action against the school committee by whose orders it was done.¹ (a) So the teacher of a town school is not liable to any action by a parent for refusing to instruct his children.² So a parent cannot maintain an action against trustees, for refusing to his child admission to a district school.³ (b)

§ 15. In connection with the subject of this chapter, may be briefly stated the privileges and liabilities of *infants* in relation to torts or wrongs. (c) For these, infants are generally responsible, although they are not bound by their contracts. (d) Thus infancy is no defence to an action of trover or trespass for the unlawful con-

¹ Donahoe v. Richards, 38 Me. 376.

³ Boyd v. Blaisdell, 15 Ind. 73.

² Spear v. Cummings, 23 Pick. 224.

age, who had earned 4s. a week for a year or two, but at the time of his death was without employment. There was no evidence of the cost of boarding and clothing the boy. The judge having left it to the jury to say, whether the father had sustained any pecuniary loss by the death of his son, and the jury having found a verdict with £20 damages; held, as there was evidence for the jury, the plaintiff was entitled to retain the verdict for the full amount. Duckworth v. Johnson, 4 Hurl. & Nor. 653.

(a) Harriet E. Learock v. Granville B. Putnam et al.—This was an action of tort to recover of the defendants damages for dismissing the plaintiff from one of the public schools. The plaintiff alleged that prior to January 15, 1871, she had been a pupil of the Franklin School, obeying all the rules and regulations of the school; that the defendants, intending to deprive her of her right to attend the school, without cause, dismissed her from the school. At the trial in the Superior Court, upon the reading of the plaintiff's declaration, the court being of opinion that the plaintiff could not sustain her action upon the ground set forth in the declaration, ordered a verdict for the defendants, and the case was reported for the consideration of the Supreme Court. That court has now ordered judgment on the verdict for the defendants. The report is as follows: "The declaration states no cause of action. The remedy for exclusion from school provided by General Statutes, chap. 41, sect. 11, is exclusive of other remedies." April, 1873, Suffolk.

(b) A parent is not liable for the wilful trespasses and torts of his infant children, when he neither assents to nor

ratifies them. Paul v. Hummel, 43 Mo. 119.

Trespass will lie against a father, for an injury committed by his team, when driven by a son with whom he was riding at the time. Strohl v. Levan, 39 Penn. 177.

Under ordinary circumstances, a young lady living at her father's house may give permission to her friend to drive her out in her father's carriage, and the friend will not be liable for the result of an accident to the horses, not arising from negligence on his part. Bennett v. Gillette, 3 Minn. 423.

(c) See Eaton v. Hill, 50 N. H. 235. In an action for the negligence of the defendants, severally of the ages of thirteen and sixteen, where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration, in determining the question of negligence. If the youth of a defendant would in any case be a defence to such an action, yet persons of the above ages must be considered, in the absence of proof to the contrary, as emancipated from childish instincts, and bound to exercise their rights with ordinary care. Neal v. Gillett, 23 Conn. 437.

(d) The only tortious acts for which an infant can be made responsible, are those committed by himself or under his immediate inspection and express direction, not those committed by persons assuming to act under his implied authority. He cannot legally create an agent. Robbins v. Mount, 4 Rob. 553. See Eaton v. Hill, 50 N. H. 235.

An infant is not liable for a malicious prosecution, brought without his authority, though afterwards assented to. Burnham v. Seaverns, 101 Mass. 360.

version of property.¹ And an infant, in an action *ex delicto* for an injury to property, is as fully liable for the damages as if he had been of full age.² So an infant is liable in *trespass quare clausum*, though the trespass was committed by the express command of his father.³ So ejectment lies against an infant for disseisin.⁴ So for a mere *fraud*, an infant may be liable to an action.⁵ (a) But to an action on the case, alleging that the defendant hired a horse and drove him so immoderately that the horse died; infancy at the times of the letting, driving, and death, is a good defence.⁶ So infancy is a good defence to an action on the case for deceit and false warranty, or false and fraudulent warranty, in the sale of goods.⁷ Nor is a defendant estopped from setting up infancy as a defence to a contract, by his fraudulent representations that he was of full age.⁸ And it is not a legal fraud, if one repudiate an agreement made by him during infancy, and therefore not binding on him, even though he may have enjoyed the fruits of such agreement.⁹ And it seems that an action of deceit will not lie against an infant, for falsely affirming himself to be of age, whereby he induces another to give him credit for goods.¹⁰ (b) But an infant is liable in *assumpsit* for money stolen, or the proceeds of property stolen and turned into money.¹¹ And an infant must either affirm or avoid his entire contract; and if he affirm it, after he comes of age, by bringing an action upon the notes given in consideration of the sale, he cannot, upon the ground of infancy, preclude the defendant from taking advantage of a false warranty, in any proper manner, as a defence.¹² So, if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it, and recover back the money or prop-

¹ *Baxter v. Bush*, 3 Wms. 465.

² *Conklin v. Thompson*, 29 Barb. 218.

³ *Scott v. Watson*, 46 Me. 362.

⁴ *Marshall v. Wing*, 50 Me. 62.

⁵ *Burns v. Hill*, 19 Geo. 22.

⁶ *Eaton v. Hill*, 50 N. H. 35.

⁷ *Prescott v. Norris*, 32 N. H. 101; 19

Vt. 505.

⁸ *Merriam v. Cunningham*, 11 Cush.

40.

⁹ *Burns v. Hill*, 19 Geo. 22.

¹⁰ *Price v. Hewett*, 18 Eng. L. & Eq.

522.

¹¹ *Shaw v. Coffin*, 58 Me. 254.

¹² *Morrill v. Aden*, 19 Vt. 505.

(a) Thus an infant who fraudulently obtains goods upon credit, with an intention not to pay for them, is liable in tort to the party injured. *Wallace v. Morss*, 5 Hill, 391. See *Matthews v. Rice*, 31 N. Y. (4 Tiff.) 457.

When property is bailed to an infant, his infancy is a protection to him for any nonfeasance, so long as he keeps within the terms of the bailment; but when he departs from the object of the bailment,

it amounts to a conversion of the property, and he is liable to the same extent as if he had taken the property in the first instance without permission. *Towne v. Wiley*, 23 Vt. 355.

(b) Under a statute giving a right of action to a woman against one who seduced her; an action lies against an infant for seduction with a promise of marriage. *Lee v. Hefley*, 21 Ind. 99.

erty, without restoring to the other party the consideration received from him. And where an infant has received a horse in exchange for other property, he cannot recover for the latter, upon an offer to return the horse, if he has so misused him as to materially lessen his value.¹ So where a horse was purchased by a minor, who paid part of the purchase-money, and gave his notes, secured by a mortgage on the horse, for the balance: held, that he could not repudiate the mortgage, and hold the horse against the mortgagee; nor could he maintain trespass against the mortgagee, or his assignee, for taking the horse, under the mortgage; as, in repudiation of the mortgage, he would nullify the sale, and therefore he could not hold the horse under it.² (a)

¹ *Bartholomew v. Finnemore*, 17 Barb. 428.

² *Heath v. West*, 8 Fost. 101.

(a) The rule, that one holding the property of an infant may be considered as the bailee of such infant, is for the latter's benefit, and for the futherance of his remedy, and the tort-feasor has no right to set it up for his own benefit against the infant. *Smith v. Reid*, 6 Jones, 494.

A contract by an infant, for the sale of personal property, may be rescinded by him before he arrives at full age. After such rescinding, an action of trespass cannot be sustained against him for taking the property. But where, in an action of trespass brought by A against B, an infant, for the taking of certain goods, of which the greater part, he claimed, were purchased by him of B, but some were purchased with the avails of goods sold, and others were originally the property of A, B did not attempt to justify the taking of the goods upon the ground that they were originally his, and

were by him sold to A, and that he had rescinded the contract, but on the ground that the goods were never sold to A, but were delivered to C, an infant son of A, to sell and account for (A being merely a surety for C), and that, by the terms of the contract, they were to be redelivered to B, whenever he chose to demand them, and that such demand had been made, and C had refused to deliver them; the defence proceeding, not on the ground that the contract had been rescinded, but in affirmance of it; the court submitted the question of title in the plaintiff to the jury, and a verdict was given for him: it was held, 1. That B had no cause of complaint, on the ground that his contract with A had been rescinded; 2. That, if such contract had been rescinded, still the defence did not cover the whole ground, and A was entitled to retain his verdict. *Shipman v. Horton*, 17 Conn. 481.

CHAPTER XLIV.

BAILMENT.

1. Bailment is a *contract*.
2. Various kinds of bailment.
3. *Deposit*.
5. *Mandate*.

7. *Commodatum* — loan.
8. *Locatio* — hiring.
9. *Warehousemen*.

§ 1. ANOTHER *relation*, which gives rise to numerous and various torts, is that of *Bailment*. Bailment is a *contract*,¹ but, as has already been explained (vol. i. chap. 1), the violation of this contract may often, at the election of the bailor, be treated as a simple wrong. It is therefore necessary to present a summary view of the subject, as falling within the plan of the present work.²

§ 2. Bailment is of various kinds, demanding different degrees of diligence, and creating a liability for different degrees of negligence, on the part of the bailees. These varieties of responsibility depend in part upon the equitable consideration, whether the bailor, or the bailee, or both, receive the benefit and profit of the bailment; and, in part, upon grounds of public policy, which have always applied to certain forms of bailment a very stringent rule of care and fidelity. In ordinary cases of bailment, uncontrolled by special stipulations, and in the absence or negligence or misconduct on the part of the bailee, an injury to property bailed falls on the bailor.³ (a)

¹ See *M'Ginn v. Butler*, 31 Iowa, 160; *Coykendall v. Eaton*, 55 Barb. 188; *Stephenson v. Price*, 30 Tex. 715; *Rockwell v. Proctor*, 39 Geo. 105; *Southern v. M'Veigh*, 20 Gratt. 264.

² See *Smith v. New York, &c.*, 43 Barb. 225.

³ *Conwell v. Smith*, 8 Ind. 530. See *Fowler v. Lock*, L. R. 7 C. P. 272; *Am. Law Rev.* vol. viii. p. 649, July, 1874.

(a) A bailee is responsible, though the owner knew and acquiesced in the degree of care exercised; more especially if he did not know all the circumstances, or informed the bailee that the mode of keeping was unsafe. *Conway v. American, &c.*, 8 Allen, 512.

A bailee is not responsible, though the goods were illegally detained, if the owner has since agreed to accept and pay for

them: a reasonable time having elapsed for their removal. *Carnes v. Nichols*, 10 Gray, 369.

Where one receives corn, under an agreement to ship to a designated place, and there sell it whenever directed so to do, a failure to sell, when so directed, will render him liable for any loss thereby incurred. *Pulsifer v. Shepard*, 36 Ill. 513.

§ 3. *Depositum* is a deposit without compensation or reward.¹

§ 4. A depositary, more especially in the absence of any special undertaking, is liable only for *gross negligence*; which is a question of fact for the jury.² (a) And a bailee without hire may terminate his custody at any moment, giving reasonable opportunity to the owner to remove his goods.³

§ 5. *Mandatum* or *mandate* is a gratuitous commission, wherein the mandatary agrees to do something with or about the thing bailed.⁴ The distinction is made, that, if one be requested to do something in relation to property, which is not delivered to him, nor any consideration paid him, although he undertakes to do it,

¹ 1 Pars. on Con. 572. See *M'Kay v. Draper*, 27 N. Y. (13 Smith) 256; *Mauzy v. Coyle*, 11 Am. Law Reg. 52; *Hale v. Rawallie*, Ib. 52; 34 Md. 285; *Beyris v. Spor*, 22 La. Ann. 16; *Rankin v. Craft*, 1 Heisk. 711.

² *M'Kay v. Hamblin*, 40 Miss. 472; *Gulladage v. Howard*, 23 Ark. 61; *Boies v. Hartford*, 37 Conn. 272; *Britton v. Aymar*, 23 La. Ann. 63; *Hobson v.*

Woolfolk, Ib. 384; *Spooner v. Mattoon*, 40 Vt. 300; *Smith v. First*, 99 Mass. 605; *Lancaster v. Smith*, 62 Penn. 47; *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Jourdan v. Reed*, 1 Clarke (Iowa), 135.

³ *Roulston v. McClelland*, 2 E. D. Smith, 60.

⁴ 1 Pars. on Con. 572. See *Lloyd v. Barden*, 3 Strobb. 343.

(a) In case of *finding* property, the standard of gross negligence is applied. *Dougherty v. Posegate*, 3 Clarke (Iowa), 88.

Gross negligence is held equivalent to *fraud*. *Tudor v. Lewis*, 3 Met. (Ky.) 378.

A deposit of bank-bills with a banking company, unless special, creates a debt, not a bailment. *Wray v. Tuskegee, &c.*, 34 Ala. 58; *Robinson v. Gardner*, 18 Gratt. 509. See *Durkin v. Hodgen*, 38 Ill. 352.

One who receives claims to collect, though without compensation, is bound to use ordinary diligence. *Moore v. Gholson*, 34 Miss. 372.

In an action by a bailor against a bailee, the bailor having proved a bailment, either for hire or gratuitous, and that the goods were returned damaged, or not at all, the presumption of negligence and burden of showing due care is on the bailee. So held, in a case of storage of household goods in good condition, although the presumption of negligence was rebutted, as to some of the articles, by proof of a fire on the bailee's premises, but where there was nothing to show but that certain furniture had been broken and carpets lost or stolen by the bailee's employees. *Cumins v. Wood*, 44 Ill. 416.

A depositary without reward is liable in the value of the chattels, if he fails to deliver them to the bailor on demand. So if, before demand, he has delivered

them to one claiming to be a joint-owner, unless he proves ownership. *Nelson v. King*, 25 Texas, 655.

It has been sometimes laid down, that a depositary is required to take no more care of the property than he does of his own. But the later and better doctrine is, that the individual general character of the bailee is not a proper subject of inquiry. 1 Pars. on Con. 574; *The William*, 6 Rob. Adm. 316.

It is said, a depositary may maintain trover, which requires only *possession*; but not *replevin*, for which *property* is necessary. 1 Pars. on Con. 578.

An agent without reward, or a bailee without hire, responsible for no more than the most ordinary care, has no right to use for his own purposes the property bailed, or needlessly to expose it. Lending it for his own purposes, and not for the bailor, is a conversion and breach of trust, especially if the bailor is a married woman. *Persch v. Quiggle*, 57 Penn. 247. See *Martin v. Cuthbertson*, 64 N. C. 328.

A mere depositary of cotton, without compensation, is not responsible for the destruction of the cotton by an armed force of men in rebel. *Levy v. Bergeron*, 20 La. Ann. 290.

Otherwise when a person having property on deposit, and not threatened by any overpowering force, allows it to be taken from his possession. *James v. Greenwood*, 20 La. Ann. 297.

he is not bound; but if he begin to do it, and then fail to do what he undertakes, he is liable *ex delicto*; although it has been a question much discussed, whether he is liable as upon a contract.¹ Thus money was intrusted to the defendant, the owner of a steamboat, by the plaintiff, a passenger who paid no more than the regular fare. There was a great crowd; two boats lying near had just been robbed. The money was stolen from the safe, and the extra watchman employed about the boat was not produced as a witness. Held, that the owner was liable as a mandatary, and that there was evidence of a want of the ordinary care, to sustain a verdict for the plaintiff.²

§ 6. It is the prevailing rule, that a mandatary is liable for gross negligence only,³ which is said to be *dolo proximus*; that is, omitting that care which even the most inattentive and thoughtless never fail to take of their own concerns; and it is a fact to be determined by the jury under all the circumstances of the case.⁴ It is sometimes held, however, that a mandatary is required to use such care as men of common sense and common prudence ordinarily take of their own affairs;⁵ and that, if he undertake the business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; and whether or not such diligence has been used, is a question for the jury.⁶ So it is said, where the work requires peculiar skill and care, a mandatary is responsible therefor.⁷ Not, however, in general, the greatest amount of skill, but only such as is usually exercised in his profession.⁸

§ 7. Another form of bailment is the *commodatum* or loan; which being a *gratuitous* bailment, — though, unlike the forms already considered, the gratuity is for the benefit of the bailee and not the bailor, — the bailee is bound to take *extraordinary care*,⁹ and is responsible for injury arising from *the slightest neglect*, though not for a loss occurring wholly without his default.¹⁰ (a)

¹ *Wilkinson v. Coverdale*, 1 Esp. 75; *French v. Reed*, 6 Binn. 308; 1 Pars. on Con. 581; *Thorne v. Deas*, 4 Johns. 84; *Gill v. Middleton*, 105 Mass. 477.

² *Jenkins v. Motlow*, 1 Sneed, 248. See *Houghton v. Lynch*, 13 Minn. 85.

³ *Lampley v. Scott*, 24 Miss. 528. See *Chouteau v. Steamboat, &c.*, 20 Mis. 519; *Kemp v. Farlow*, 5 Ind. 462; *Dart v. Lowe*, 5 Ind. 131; 17 Ill. 170; *Conner v. Winton*, 8 Ind. 315.

⁴ *McNabb v. Lockhart*, 18 Geo. 495.

⁵ *Skelley v. Kahn*, 17 Ill. 170.

⁶ *Kirtland v. Montgomery*, 1 Swan, 452.

⁷ 1 Pars. on Con. 588.

⁸ *Ib.* 589, n.; *Percy v. Millaudon*, 20 Mart. 68, 75.

⁹ *Phillips v. Coudon*, 14 Ill. 84; *Scranton v. Baxter*, 4 Sandf. 5; *Howard v. Babcock*, 21 Ill. 259.

¹⁰ *Wood v. McClure*, 7 Ind. 155.

(a) A person who borrows a horse is the horse has died, he must show the liable for the slightest negligence. If degree of care required by the nature of

§ 8. Another, and the most comprehensive and important form of bailment, is that termed *locatio* or *hiring*, for a reward or compensation. Without reference to those special kinds of hiring, which will be hereafter considered, and which, for peculiar reasons, involve the most rigid degree of responsibility; a bailee for hire is bound to use *ordinary diligence and care* in the protection of the property hired, which will vary in degree according to the nature of the property, and the circumstances in which it is placed; the question being for the jury.¹ Ordinary diligence means that degree of care, attention, and exertion, which, under the circumstances, a man of ordinary prudence and discretion would exercise, in reference to the particular thing, were it his own; or which the generality of mankind use in keeping their own goods of the same kind.² (a) So where work is done for hire, as in an operation on a diseased horse, ordinary diligence alone is required.³ There is, also, on the part of the hirer, an implied obligation not only to use the thing hired with due care and moderation, but also not to apply it to any other use, or detain it beyond the time for which it was hired. Otherwise, he is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.⁴ So it is the duty of a bailee for hire, if the property be *stolen* from him, to show that he used due and reasonable care of the property.⁵ (b)

¹ *Swigert v. Graham*, 7 B. Monr. 661. See *Logan v. Mathews*, 6 Barr. 417; *Runyan v. Caldwell*, 7 Humph. 134; *Dudgeon v. Teass*, 9 Mis. 857; *M'Conike v. New York, &c.*, 20 N. Y. (6 Smith), 495; *Slocumb v. Washington*, 6 Jones, 357; *Knox v. North, &c.*, 6 Jones, 415; *Tallahassee, &c. v. Macon*, 8 Flor. 299; *Townsend v. Hill*, 18 Tex. 422; *Dement v. Scott*, 2 Head, 367; *Pensacola v. Nash*, 12 Flor. 497; *Harvey v. Skipwith*, 16

Gratt. 393; *Field v. Brackett*, 56 Me. 121; *Cardinal v. Edwards*, 5 Nev. 36; *Maynard v. Buck*, 100 Mass. 40; *Lamb v. Camden*, 2 Daly, 454. See p. 526.

² *Mayor, &c. v. Howard*, 6 Geo. 213; *Jackson v. Robinson*, 18 B. Monr. 1.

³ *Conner v. Winton*, 8 Ind. 315. See *Kuehn v. Wilson*, 13 Wis. 104.

⁴ 6 Geo. 213.

⁵ *Brown v. Waterman*, 10 Cush. 117. See *Petty v. Overall*, 42 Ala. 145.

the bailment. So although the bailee pays for the keeping of the horse while he has him. *Bennett v. O'Brien*, 37 Ill. 250.

Where a horse, loaned by the plaintiff to the defendant, was carried to the defendant's house and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind, the weather being wet, slipped and fell upon a stump, breaking its thigh; held, these facts did not import such negligence, as to render the defendant liable. *Fortune v. Harris*, 6 Jones, 532.

(a) A *bailor*, who knows the use for which property is bailed, engages that it is suitable to the use for which it is hired, and authorizes the use of it in the ordinary manner, unless there should be some special reasons known to the bailee why it should not be so used. 7 B. Monr. 661.

(b) One who negligently receives goods not directed to him incurs the liability of a bailee for hire. *Newhall v. Paige*, 10 Gray, 366.

In a bailment for hire, the benefit may be contingent. *Ibid.*

One who has a boat in possession for

§ 9. *Warehousemen* come under this head of bailment.¹

§ 10. Where property deposited with a warehouseman is delivered

¹ See *Quiggin v. Duff*, 1 M. & W. 174; *Low v. Martin*, 18 Ill. 286; *Cox v. O'Riley*, 4 Ind. 368; *Myers v. Walker*,

31 Ill. 353; *Cincinnati v. M'Cool*, 26 Ind. 140; *Dole v. Olmstead*, 36 Ill. 150.

repairs is answerable for damages sustained by ice, if he launch her carelessly at a time when danger from such a source might easily have been foreseen. *Smith v. Meegan*, 22 Mis. 150.

But an agreement of a bailee for hire to return the chattel in good order is excused, if, without fault of his, it is destroyed by an *irresistible force*; as where a barge was destroyed by ice on the Mississippi. *M'Evers v. Steamboat, &c.*, 22 Mis. 187.

A bailee is not responsible for a loss by an armed force. *Abraham v. Munn*, 42 Ala. 51; *Yale v. Oliver*, 21 La. Ann. 434.

An *agistor of cattle* is responsible for their loss, only upon proof of want of ordinary care and diligence. *Rey v. Toney*, 24 Mis. 600; *Umlauf v. Bassett*, 38 Ill. 96.

A let an ass to B, for a season, B warranting against "accidents," and agreeing to return him sound, or pay \$1,000 if damage should be done to him. Injuries from sickness, lightning, and "accident," were excepted. Soon after the season commenced, the ass was returned, diseased and disabled, by a wound inflicted on him. There was no evidence of negligence or misconduct on the part of B; but witnesses expressed the opinion that the ass had been poisoned, and also that the spermatheca cord had been punctured. The jury gave a verdict for the defendant, and the court sustained the verdict. *Conwell v. Smith*, 8 Ind. 530.

The hirer of a horse is liable for a want of reasonable care and skill in driving him; and, unless he is manifestly incapable of using such care and skill, it is immaterial whether the keeper of the stable expected or had reason to expect that he would or would not be careless or unskilful. *Mooers v. Larry*, 15 Gray, 451.

If a thing hired is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but, if a loss occurs, although by inevitable casualty, he will generally be responsible. *Lewis v. McAfee*, 32 Geo. 465.

K. borrowed a mare to ride some three miles in the country, and, instead of doing so, put the mare in a buggy and drove

her some twelve or fourteen miles, where the mare was watered and put into a stable and fed, without any attention or care by K., and the next morning was found dead. In an action by the owner against K., the court instructed the jury that "the defendant would be liable for any neglect, if the letting was a loan and not a hiring; but if the letting was on hire, the defendant was only bound to use and feed and attend to the mare with such care as a man of ordinary prudence would bestow on his own property of the like kind under such circumstances; and if the defendant did bestow such ordinary care and diligence in the use and care of the mare, they must find for the defendant." Held to be correct. *Kennedy v. Ashcraft*, 4 Bush, 530.

An *agistor of cattle* is not an insurer, and is only bound to exercise reasonable care; and a loss of the cattle, without its being shown affirmatively that the loss resulted from failure to exercise such care, will not make the defendant liable. *McCarthy v. Wolfe*, 40 Mis. 520.

An *agistor of cattle* is liable for damages resulting from the negligence of his servants, but not for those resulting from "doggings," or other wilful acts committed by the servants without his knowledge or consent. *Halty v. Markel*, 44 Ill. 225.

In an action against the hirer of a mare for her sickness and death from immoderate driving, evidence of the traveling expenses of the bailor in going to her, attending her, and bringing her home, is admissible. *Graves v. Moses*, 13 Minn. 335.

A miller, with whom corn is left for grinding, though without notice, is liable for ordinary care. *Spangler v. Eicholtz*, 25 Ill. 297.

The custody, which the officers of customs have of goods in a bonded warehouse, is not a possession, but rather a restraint upon removal vested in the government to secure payment of duties, while the possession is in the person who placed them there, or in the owner of the warehouse as his agent. *Cartwright v. Wilmerding*, 24 N. Y. (10 Smith) 521.

A watchmaker, who receives a watch to repair, is bound to use ordinary dili-

to some person other than the owner, by the mistake or negligence of the bailee, this is, in law, a *conversion* by the bailee, at least after demand.¹ Thus, in an action against a railroad company, as warehousemen, for a failure to deliver property received by them, the judge instructed the jury, among other things, "that, if the property was taken by mistake from the defendants' depot, and they exercised ordinary care in the matter, they would not be liable; but, if the defendants' agent delivered it by mistake to a wrong person, they would be answerable." Held, such instructions, taken together, were no cause for a new trial.² So warehousemen, who give their receipts for goods on storage, are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them, by the holder of the receipt, for a conversion of the goods by seizure in an action against a vendor of the plaintiff.³ So a roll of carpeting was delivered to the defendant, a storage and forwarding merchant, at his store, on the Erie Canal, to be forwarded as directed, in the usual course of business; the charges to be paid at the end of the route. The defendant omitted to take a receipt, or make a memorandum of the transaction, and failed, when requested, to give any account of the property; which was never received by the owner. Held, the defendant was liable.⁴ (a)

¹ Willard v. Bridge, 4 Barb. 361; Dufour v. Mephram, 31 Mis. 577; Alabama, &c. v. Kidd, 35 Ala. 209. See Pierce v. O'Keefe, 11 Wis. 181.

² Lichtenhein v. Boston, &c., 11 Cush. 70.

³ Goodwin v. Scannell, 6 Cal. 541.

⁴ Bush v. Miller, 13 Barb. 481.

gence in its safe-keeping; if stolen through his negligence, he will be liable, even without demand. Halyard v. Dechelman, 29 Mis. 459.

Where the keeper of a livery-stable permitted the owner of certain horses to go into the stable, at a late hour of the night, and take them out, in consequence of which, a horse belonging to the plaintiff made his escape and was lost, either by passing out with the other horses, or afterwards, a part of the door being left open; held, the owner of the stable was liable for such loss. Swann v. Brown, 6 Jones, 150.

A clause in a lease of furniture, binding the lessee to "surrender the property in as good a condition as reasonable use and wear thereof would permit," does not vary the duty imposed by the law of bailments; and therefore a loss by fire, without fault on the part of the hirer, falls on the owner. Hyland v. Paul, 33 Barb. 241.

Under St. 39 and 40 Geo. III. c.

99, § 24, the injury done to goods pawned, by an accidental fire, on the premises of a pawn-broker, not affirmatively shown to have occurred through the default, neglect, or wilful misbehavior of the pawnbroker, does not authorize a justice to give satisfaction to the pawnor; there being no *prima facie* presumption that such fire is owing to the default, &c., of the owner of the premises. Syred v. Carruthers, 1 Ell. Bl. & Ell. 469.

(a) Under such bailment, the bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered, and liable to mildew; and the bailor, that the goods were in the ordinary trade condition, and that the bailee knew they should have been aired and dried. Brown v. Hitchcock, 2 Wms. 452.

In an action against warehousemen for the non-delivery of property bailed to them, the defence was, that the property had been fraudulently taken from

§ 11. But a warehouseman is not responsible, where robbers break into the building and carry off the goods.¹ So want of ordinary care in one particular, on the part of a warehouseman, does not render him responsible for a loss occasioned by other and independent causes.² And the law does not require a warehouseman to construct his buildings secure from all possible contingencies; but only that they be reasonably and ordinarily safe against ordinary and common occurrences.³ Nor does an agreement to store cotton in a fire-proof warehouse devolve on the warehouseman the necessity of providing water and buckets for the extinguishment of fire, there being no such terms in the contract, or custom among warehousemen.⁴ And a warehouseman, who fails to deliver property bailed to him, is bound to show only that the loss occurred without a want of ordinary care or diligence on his part; not necessarily the precise manner in which the loss occurred.⁵

¹ Williams v. Holland, 22 How. (N. Y.) 137.

² Gibson v. Hatchett, 24 Ala. 201.

³ Cowles v. Pointer, 26 Miss. 253.

⁴ Jones v. Hatchett, 14 Ala. 743.

⁵ Lichtenhein v. Boston, &c., 11 Cush. 70.

their custody, without any negligence on their part, and the plaintiff did not claim that the property had been in fact delivered to any person. Held, the plaintiff could not give evidence of a usage among warehousemen of taking receipts from persons to whom property was delivered. *Lichtenhein v. Boston, &c.*, 11 Cush. 70.

In case of a regular deposit of wheat with a warehouseman, which requires of the depositary due diligence in the care of the property, and that he should redeliver it to the owner or to his order on demand, on being paid a reasonable compensation for his services; the warehouseman would be liable to the depositor for the value of the wheat, in case he mixes it with other wheat in his warehouse, and ships the same for sale on his own account, notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in the warehouse; and the wheat supplied to take the place of the depositor's wheat will not protect the warehouseman from liability to the owner. *Chase v. Washburn*, 1 Ohio, N. S. 244.

When the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense, it was held that their removal, by an agent of the bailees, though without their knowledge, made them liable for the safe-keeping of the goods after their removal. *St. Losky v. Davidson*, 6 Cal. 643.

The strict liability of an innkeeper, or common carrier, does not attach to a *public miller*; but he is bound to exercise a "high degree of care and diligence," in respect of grain left in his custody, and, if the property is lost by his fault, imprudence, or neglect of any precaution becoming his situation, he will be held responsible. *Wallace v. Canaday*, 4 Sneed, 364.

Where the liabilities of a common carrier have ceased, and he has become responsible as warehouseman and forwarder, he is bound for ordinary care and diligence, such as a prudent man would exercise over his own property of like nature; and in proportion to the loss likely to be sustained by want of such care. *Baltimore v. Schumacher*, 29 Md. 168; *Chicago v. Scott*, 42 Ill. 132.

The plaintiff shipped wine to A, which was received by the defendant, a wharfinger. With intent to defraud the plaintiff, A indorsed the bill of lading to B, who obtained delivery orders from the defendant. A then wrote to the plaintiff, refusing to accept the wine. The plaintiff tendered all charges to A and B, but the defendant refused to deliver the wine. Held, as the defendant could claim only under A, and A only under B; he had no title as against the plaintiff, and an action for the wine was maintainable. *Batut v. Hartley*, L. R. 7 Q. B. 594.

CHAPTER XLV.

BAILMENT. — INNKEEPERS.

1. Degree of responsibility.
3. To whom responsible; for what property and for what time; *guests* and *boarders*.

4. Animals.
- 4 a. A guest's care of his own goods.
5. Loss from a party's own negligence.
6. Lien.

§ 1. ANOTHER class of bailees consists of *innkeepers*. An innkeeper is sometimes regarded as an *insurer*.¹ His responsibility is said to be like that of a *carrier*; — as in a case of *fire*;² an obligation to keep the goods of his guests, so that they shall be actually safe, except against inevitable accidents, and the acts of public enemies, and of the owners and their servants. He is held responsible for well and safe keeping; and proof that there was no negligence in himself or servants is held not sufficient for his immunity.³ In other words, an innkeeper is held liable for damage happening in his inn to the goods of his guest, unless it is caused by the act of God, or the public enemy, or by the fault, direct or implied, of the guest.⁴ As for goods lost or stolen out of his inn.⁵ And an innkeeper is responsible for property of a guest left in the inn, though not placed in the special keeping of the innkeeper.⁶ So his responsibility for the property extends to every part of his house into which it is usual for such property to be taken; unless there was a different understanding between him and his guest.⁷ (a)

¹ *Gile v. Libby*, 36 Barb. 70. See *Murray v. Clarke*, 2 Daly, 102; *Sasseen v. Clark*, 37 Geo. 242.

² *Hulett v. Swift*, 42 Barb. 230.

³ *Shaw v. Berry*, 31 Me. 478; *Willard v. Reinhardt*, 2 E. D. Smith, 148; 2 Met. (Ky.) 439; *Howth v. Franklin*, 20

Tex. 798. See *Laird v. Eichold*, 10 Ind. 212.

⁴ *Sibley v. Aldrich*, 33 N. H. 553; *Mason v. Thompson*, 9 Pick. 230. See 10 Ind. 212.

⁵ *Clute v. Wiggins*, 14 Johns. 175.

⁶ *McDonald v. Edgerton*, 5 Barb. 560.

⁷ *Epps v. Hinds*, 27 Miss. 657.

(a) The latest authorities sometimes qualify the strict liability stated in the text.

An admission by an innkeeper, that he left money, intrusted to him for the purpose of taking up a bill, in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own; is evidence of gross negligence. *Doorman v. Jenkins*, 4 Nev. & Man. 170.

The (Pennsylvania) act of 1794 does not repeal or take away the innkeeper's

license; but qualifies, limits, and restrains it. If a traveller come to an innkeeper on Sunday, he is bound to receive him, and afford him rest and refreshment, though he may not sell him liquor. *Commonwealth v. Naylor*, 34 Penn. 86.

Though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels; still he is liable to make good the loss, if the

§ 2. In conformity with this principle of liability, where the property of a guest is lost or injured, the burden of proof is on the innkeeper, to show that it occurred without his fault.¹ So if the property of a guest is lost by a burglarious entry of an inn, under circumstances that excuse the innkeeper from all negligence, still he is not exonerated upon presumption merely, without proof of some of the circumstances.² But it is held that an action cannot be sustained for property lost by fire, through inevitable casualty or superior force, and without any negligence on the part of the innkeeper or his servants.³ And the *prima facie* presumption, that a loss or damage was occasioned by the negligence of the innkeeper or his servants, may be rebutted; and, if the jury find in favor of the innkeeper as to the negligence, he will prevail on a plea of *not guilty*.⁴

§ 3. Although an innkeeper is held the *insurer* of the goods of his *guest*, yet he is only liable for goods brought into his house by parties in the character of guests.⁵ (a) An innkeeper is said to be

¹ Johnson v. Richardson, 17 Ill. 302; 5 Ad. & Ell. N. S. 164.

² McDaniels v. Robinson, 26 Vt. 316.

³ Merritt v. Claghorn, 23 Vt. 177; Vance v. Throckmorton, 5 Bush, 41; Woodworth v. Morse, 18 La. Ann. 156. See Sibley v. Aldrich, 33 N. H. 553.

⁴ Dawson v. Chamney, 5 Ad. & Ell. N. S. 164; Laird v. Eichold, 10 Ind. 212. See Mateer v. Brown, 1 Cal. 221.

⁵ Mateer v. Brown, 1 Cal. 221. See Carter v. Hobbs, 12 Mich. 52.

owner stop as a guest, and the goods be stolen during his stay. Bennet v. Mellor, 5 T. R. 273.

The liability of an innkeeper extends to all the movable goods and money of the guest, which are placed within the inn, and is not restricted to such things and sums only as are necessary and designed for the ordinary travelling expenses of the guest. Berkshire, &c. v. Proctor, 7 Cush. 417. See p. 537.

So if he is accustomed to receive packages for the accommodation of guests, though not baggage; he will be liable therefor. Needles v. Howard, 1 E. D. Smith, 54.

But he is not held liable for silver knives, forks, and spoons. Pettigrew v. Barnum, 11 Md. 434.

It is held that an action brought against an innkeeper, for the loss of goods intrusted to him by a guest, who is a servant of the owner, may be brought in the name of the owner. And one who hires the goods is for this purpose the servant of the owner. Mason v. Thompson, 9 Pick. 280. See Ingalsbee v. Wood, 36 Barb. 452.

So if the agent of a corporation, engaged in their business, becomes the guest of an innkeeper, and is robbed of money delivered to him by his principals, to be expended in their behalf, the innkeeper is liable to the corporation. Berkshire, &c. v. Proctor, 7 Cush. 417.

So where a father delivered to his son, a minor, money to pay his travelling expenses on his way to college, and his expenses while there, and the son, on his way, stopped at a public inn, where the money was stolen; a suit may be brought in the father's name. Epps v. Hinds, 27 Miss. 657.

If a partner, being a guest at an inn, loses goods of the firm, the firm may maintain an action therefor. Needles v. Howard, 1 E. D. Smith, 54.

An innkeeper may be liable for the loss of property in the hands of the owner's wife or servant. Coykendall v. Eaton, 55 Barb. 188.

Or of a gratuitous bailee. Kellogg v. Sweeney, 1 Lans. 397.

(a) Trover does not lie against an innkeeper, for the mere loss of a parcel left at the inn for the purpose of conveyance

one who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms.¹ (a) A person who does not hold himself out as an innkeeper, but entertains travellers occasionally for pay, is not an innkeeper, nor liable as such; and he is responsible only for negligence in respect to property of travellers intrusted to his care.² A *restaurant* is not an inn.³ But a hotel in a city which receives transient guests is a common inn.⁴ So a man had a house on the high road, much visited by travellers, who were uniformly entertained and charged. These facts were notorious, and relied on by travellers. On the other hand, he often declared that he did not keep an inn, refused to take boarders, and often entertained his friends and countrymen free of charge. Held, though he lived in a partly settled country, on this evidence the jury might find him an innkeeper.⁵ And if a person puts up his horse at an inn, it makes him a guest, and the relation extends to all his goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. He need not take all his meals or lodge every night there.⁶ So purchasing liquor at an inn is sufficient to constitute the purchaser a guest.⁷ So where a guest goes away for a short time, leaving his property,

¹ *Wintermute v. Clark*, 5 Sandf. 242. See *Bendetson v. French*, 46 N. Y. 266; *People v. Jones*, 54 Barb. 311; *Cromwell v. Stephens*, 2 Daly, 15; *Krohn v. Sweeney*, 2 Daly, 200.

² *Lyon v. Smith*, 1 Morris, 184.

³ *Carpenter v. Taylor*, 1 Hilt. 193.

⁴ *Taylor v. Monnot*, 4 Duer, 116.

⁵ *Howth v. Franklin*, 20 Tex. 798.

⁶ *McDaniels v. Robinson*, 26 Vt. 316.

⁷ 5 Barb. 560.

by a carrier. *Williams v. Gessey*, 5 Scott, 56, 57; 3 Bing. N. R. 849.

If the servant of an innkeeper takes charge of the baggage, goods, &c., at the hotel to deliver at the cars, for the guest, the liability of the innkeeper continues until such delivery. *Sasseen v. Clark*, 37 Geo. 242.

(a) A townsman or neighbor may be a guest. *Walling v. Potter*, 35 Conn. 183.

The relation of innkeeper and guest may be created by delivery by the plain-tiffs of their team to the ostler to be put up, laying aside their overcoats in the innkeeper's presence, calling for and taking dinner, and paying the bill on departure at night, though not calling for a room, and though stopping at the inn to attend trial of a suit brought against them by the innkeeper. *Read v. Amidon*, 41 Vt. 15.

A river lumberman, went to a hotel, and, after remaining two or three days, informed the hotel-keeper that he should

be there frequently during the summer, and desired some deduction in the regular charge of the hotel; and it was agreed to keep him for one dollar per day, the regular price being two dollars. Nothing was said as to the length of time he expected to remain. Held, he was a guest, and not a boarder. *Shoecraft v. Bailey*, 25 Iowa, 553.

An inn is a public house of entertainment for all who choose to visit it; being travellers, of good conduct and with the means of payment; while the keeper of a private boarding-house is at liberty to choose his guests. *Pinkerton v. Woodward*, 33 Cal. 557.

A traveller, who enters an inn as a guest, does not cease to be a guest by proposing to remain a given number of days or by ascertaining the price that will be charged for his entertainment, or by paying in advance for part or the whole of the entertainment, or paying as his wants are supplied. *Ibid.*

and intending to return, he continues a guest; and the innkeeper is liable for his property, if lost during his absence.¹ But the liability as an innkeeper ceases, when the guest pays his bill, and leaves the house with the declared intention of not returning. If he leaves his baggage behind him, the innkeeper is no longer responsible for its safe keeping, unless it is specially committed to his charge, and then only as a common bailee.² So an innkeeper is not liable as such for property left by a guest who does not intend to return, though by a distinct contract he has agreed to board the guest's horse after his departure.³ As to the distinction between a guest and a *boarder*; although in general the contract with the former is *implied*, and with the latter *express*, yet if a traveller who puts up at an inn, and is received there as a guest, makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder.⁴ But an innkeeper is not liable for the clothing of a boarder, which may be stolen from the boarder's room, without the innkeeper's fault, although he would be for that of a guest.⁵ (a)

¹ M'Donald v. Edgerton, 5 Barb. 560.

² Wintermute v. Clark, 5 Sandf. 242.

³ McDaniels v. Robinson, 2 Wms. 387.

⁴ Berkshire, &c. v. Proctor, 7 Cush.

417; Willard v. Reinhardt, 2 E. D. Smith, 148; Hall v. Pike, 100 Mass. 495.

⁵ Manning v. Wells, 9 Humph. 746.

(a) As to what constitutes a boarding-house, see Cady v. M'Dowell, 1 Lans. 484.

One who merely keeps a lodging-house for strangers for a season, at a watering-place, is not an innkeeper within the meaning of 1 Rev. Sts. (Ky.) 404. Southwood v. Myers, 3 Bush, 681.

A petition, to enforce a lien on the baggage of a guest for board, &c., must allege that the petitioner is a tavern-keeper; an averment that he is "landlord and proprietor" of the house is insufficient. Ibid. See Shafer v. Guest, 6 Rob. 264; Ambler v. Skinner, 7 Rob. 561.

Declaration, that the plaintiff had become a guest in the boarding-house of the defendant, upon the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff whilst they were in the house of the defendant, for hire and reward, and it then became the duty of the defendant, by herself and servants, to take such care of the plaintiff's goods whilst a guest in the defendant's house. Breach of the alleged duty, and a loss of the plaintiff's goods, by the neglect of the defendant and her servants. It appeared that the plaintiff had been received as a guest in the de-

fendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff, being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and, whilst he was absent on the errand, a thief entered the house, and stole a box of the plaintiff's from the hall. The judge directed the jury, that the defendant was not bound to take more care of the house, and the things in it, than a prudent owner would take, and that she was not liable, if there were no negligence on her part in hiring and keeping the servant; and he left it to the jury to say, whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. Held, by the court, that at least it was the duty of the defendant to take such care of her house, and the things of her guests in it, as every prudent householder would take. By Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things,

§ 3 *a*. Whether the sum of money stolen was reasonable and necessary for the guest's travelling expenses, is a question for the jury.¹ The baggage, for which an innkeeper is responsible, is such articles of necessity or personal convenience as are usually carried by passengers. What articles may be denominated baggage, must in each case be determined by the jury from the facts and circumstances.² It is held that the liability embraces all the property brought to the inn.³ It is not restricted to goods, designed by the plaintiff for his use while on his journey or while a guest in the inn, or those lost by the fraud or negligence of the defendant.⁴ It embraces pocket-money retained by the guest in his own possession.⁵ An ordinary watch and chain are not "money, jewels, or ornaments," within the New York act of 1855, limiting the liability of hotel-keepers.⁶ The liability extends to jewelry in a trunk.⁷

§ 4. An innkeeper's responsibility extends to the care of *animals*. If a person commits his horse to an innkeeper, to be fed, he is a guest, although he do not himself lodge or receive any refreshment at the inn.⁸ So if an innkeeper, being also a keeper of a livery-stable, receives a horse to be fed, without giving notice that he receives it as keeper of the stable, he will be answerable as innkeeper.⁹ So if a horse, chaise, and harness are delivered to an innkeeper, and he receives no separate compensation for keeping the chaise and harness, he is nevertheless liable for the loss of them.¹⁰ (*a*) But where one left his horse in the barn of an inn, to

¹ *Maltby v. Chapman*, 25 Md. 307.

² *Sasseen v. Clark*, 37 Geo. 242. See p. 534, n.

³ *Kellogg v. Sweeney*, 1 Lans. 397.

⁴ *Treiber v. Burrows*, 27 Md. 130.

⁵ *Weisenger v. Taylor*, 1 Bush, 275.

⁶ *Ramaley v. Leland*, 6 Rob. 358.

⁷ *Kellogg v. Sweeney*, 1 Lans. 397.

⁸ *Mason v. Thompson*, 9 Pick. 280.

⁹ *Ibid.*

¹⁰ *Ibid.*

and to take due and reasonable care of her goods; and that, if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the judge was not correct. But by *Wightman, J.*, and *Erle, J.*, that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that, if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and, therefore, that the direction at the trial was right. *Dansey v. Richardson*, 25 Eng. L. & Eq. 76.

(*a*) An innkeeper agreed with the owner of a horse, to entertain the man having charge of him one day each week, or oftener, if he should stop there with the horse, furnish him provender, and allow him to be kept in a certain stall. None but the man having charge of the horse took care of him. The horse was injured in the stall. Held, the innkeeper was answerable. *Washburn v. Jones*, 14 Barb. 193.

The plaintiff with two horses stopped at the defendant's tavern. He had his horses put in the stable and fed, and had his own dinner; for all which he paid the defendant. When the plaintiff was ready to leave, he started with the defendant to get the horses, but the defendant was interrupted. The plaintiff then said: "I can get my own horses, as you are busy;"

be cared for by the innkeeper, but himself made no proposition to become a guest, but ate, drank, lodged, and was provided for at a different place; held, the innkeeper was under no liability, as such, for the horse, but only as a bailee.¹ An innkeeper may, by special arrangement, receive property as bailee, and only the liability of a bailee will then attach to him; though the *onus probandi* that he took it in such character, and not as an innkeeper, would perhaps be thrown upon him.² And though an innkeeper is *prima facie* liable for animals belonging to a guest, he is not liable for a horse kept in a lot by special agreement;³ and he may discharge himself by showing proper care and attention on his part.⁴ (a)

§ 4 a. To render an innkeeper liable, it is not necessary that the baggage should be in his special keeping; it is generally sufficient, that it is in the inn, under his implied care. (b) He may be exonerated, by showing that the guest has taken upon himself exclusively the custody of his own goods; but not by his request that

¹ Ingalsbee v. Wood, 36 Barb. 452.

² Ibid.

³ Neal v. Wilcox, 4 Jones, 146; 3 Barb. 452.

⁴ Metcalf v. Hess, 14 Ill. 129.

to which defendant replied: "I will be there as soon as I can get there." The plaintiff went to the barn, put the headstalls on the horses, and was getting them out, and while doing so the defendant arrived there. Before the defendant reached the barn, two men rode up in a buggy, and unbridled their horse, which was a stallion, and placed him in a stall between those occupied by the plaintiff's horses and the outer door. Plaintiff led one of his horses out of the door, and the other followed on as it was accustomed to do, and, when passing the stall where the stallion stood, received a kick from him, which broke its leg. Held, at the time the injury was done, the liability of the innkeeper had not ended; that the plaintiff was only doing for him, and with his assent, what it was his duty to do. Seymour v. Cook, 53 Barb. 451.

(a) The horse of a guest in a common inn was stabled with another horse, and kicked and injured by it. Held, though these facts raised a presumption of negligence, the innkeeper might in defence show due care. Dawson v. Cholmeley, 1 Dav. & Mer. 348.

The defendant, an innkeeper, took the plaintiff's horse to keep. The plaintiff rode out the horse one evening, and, on returning to the stable, tied him to the stall where he had been previously kept. The next morning the horse was found

dead in the same stall, with his head fast in the trough. The trough was made of a hollow beach log, having a bulge in the middle which rendered that part of the trough wider than it was at the top. The horse had got his head fast in the trough by the jaws, and, as the witnesses supposed, had killed himself in the attempt to draw it out. Held, the plaintiff was not entitled to recover. Thickestun v. Howard, 8 Blackf. 535.

In case against an innkeeper, to recover the value of a horse choked to death by his halter in the defendant's stable; the defendant proved, that the horse had been secured in the stall under the superintendence and direction of the plaintiff; and in reply the plaintiff proved the very bad condition of the stall. Held, the defendant was not entitled to rejoin, in evidence. Jordan v. Boone, 5 Rich. 528.

(b) He is not liable for money intrusted to a guest or inmate unless done on the security of the inn, which is a question for the jury. Houser v. Tully, 62 Penn. 92.

He is liable for property delivered to his servant, and by him to a stranger, or lost by his negligence. Coykendall v. Eaton, 55 Barb. 188.

The innkeeper is responsible for persons allowed to act for him in his absence. Rockwell v. Proctor, 39 Geo. 105.

they shall remain in some particular place in the inn, not in his exclusive possession, but under the control and supervision of the innkeeper. Unless the innkeeper has given his guest notice, that he will not be responsible for the goods if they are left in the public room, his liability still continues.¹ It is held that the innkeeper will be liable for the necessary baggage of the traveller, his watch and personal apparel, and for money which he has about him for his personal use when stolen, notwithstanding a regulation of the inn, requiring travellers to deposit certain articles of value in the safe at the office; though not for those not immediately requisite to his comfort.²

§ 5. An innkeeper is not liable for the loss of goods, if the plaintiff was guilty of gross negligence.³ And it is held that gross negligence need not be shown, but only that the guest has by his own neglect or imprudence exposed his goods to peril.⁴ (a) Thus

¹ Packard v. Northcraft, 2 Met. (Ky.) 439.

² Pope v. Hall, 14 La. Ann. 324; Profflet v. Hall, *Ib.* 524.

³ Armistead v. White, 6 Eng. L & Eq. 349.

⁴ Fowler v. Dorlon, 24 Barb. 384; Hadley v. Upshaw, 27 Tex. 547.

(a) Action for loss of a watch and money. It was proved, that the guest showed his money openly in the commercial room, went to bed, and slept with his bedroom door open, so that a person outside could see his watch and money on the table. Late at night, a servant of the defendant, whose duty it was to sit up all night and attend to the outer door of the inn, let in a stranger, who, two hours afterwards, secretly left the inn, having stolen the watch and money. The judge left it to the jury to say "whether the plaintiff had been guilty of gross negligence, telling them that if he had, the defendant was entitled to their verdict; but if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict."

Verdict for the plaintiff. Held, the direction was wrong; and that the goods remained under the charge of the innkeeper, and under the protection of the inn, so as to make him liable as for breach of duty, unless the negligence of the guest occasioned the loss, in such a way as that it would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances. *Cashill v. Wright*, 37 Eng. L & Eq. 175.

Where a traveller directed that his trunk, which contained money, should be carried to the room into which the inn-

keeper had shown him to sleep for the night, and in the night the trunk was broken open and the money stolen; held, the traveller having only conformed to the general custom, the innkeeper was liable. *Eppe v. Hinds*, 27 Miss. 657.

Travellers are held not bound to deposit their money in a safe at an inn, although they may know one is provided for that purpose. *Johnson v. Richardson*, 17 Ill. 302.

A statute of New York provides that an innkeeper shall not be liable for the loss of valuable articles, if notice is posted in the rooms, that a safe is provided for them. And it was held that actual notice, by analogy, would sustain the same defence. *Purvis v. Coleman*, 1 Bosw. 322; 21 N. Y. (7 Smith) 111. See *Fuller v. Coates*, 18 Ohio St. 348.

Held, also, that, after actual notice, leaving \$2,000, in gold, in a room in a New York hotel, was such negligence, as to exonerate the hotel-keeper, independently of any statute. *Ibid.*

Where a guest, in compliance with a general notice, delivered to the clerk, to be deposited in a safe, a sealed package, and, in reply to an inquiry concerning the contents, said "money;" held, the innkeeper was liable for a loss, only to the amount of reasonable travelling expenses. *Wilkins v. Earle*, Am. Law Reg., Oct. 1865, p. 742, New York. (Containing an elaborate and learned view of the general

where the plaintiff had, on the evening of the night in which the theft was committed, and on several previous occasions, opened his

subject, more especially a citation of the most ancient reports and abridgments).

The New York act of 1856, c. 421, was intended to exempt hotel-keepers from liability as to certain property or goods therein specified, in certain cases, and not to affect the principle or policy upon which their liability was established, or the nature of the contract or duty upon which it was enforced, at common law. *Gile v. Libby*, 36 Barb. 70.

A watch, pencil-case, and \$25.00 in money, lost by a guest in a hotel, are not, it seems, *baggage*, within the meaning of the act of 1855, c. 421, § 2. *Ibid.*

A traveller was put into a room in a hotel with a fellow-lodger, contrary to his remonstrances expressed to the servant, and his watch, money, &c., were stolen under circumstances rendering it extremely probable that the fellow-lodger took them. Held, that under the act of 1855, c. 421, § 2, the innkeeper would not be protected on account of failure of the loser to lock and bolt his door, since such precaution could not probably have prevented the loss. *Ibid.*

An innkeeper is liable for a watch-guard, and a pocket-book containing a sum of money no larger than is reasonable for travelling expenses, stolen from a guest's room at night, the door being locked but not bolted. A notice was posted on the door of the guest's room to bolt his door. The guest testified that he could not bolt it because the catch was out of place. The clerk testified, that the morning after he bolted the door without difficulty. *Maltby v. Chapman*, 25 Md. 307.

Western Circuit. Bristol, August 16. (Before Mr. Justice Willes.) *Verrall v. The Grand, &c.* — This was an action to recover £253, which had been stolen from the plaintiff in the defendants' hotel, as was alleged, through their negligent keeping. The defendants had paid £30 into court, and denied their liability beyond that amount.

The plaintiff, Mr. John Claudius Verrall, is a turf speculator and betting agent, residing at Langton Place, Brixton. He is a member of Tattersall's, and of both the Victoria and Albert Clubs, and arranges bets for gentlemen, and bets also on his own account. On the 23d of May he had transacted business at each of his clubs, and drew a check for £600 on the branch bank of the London and Westminster Bank, at Temple-bar, re-

ceiving six £100 notes. He made some payments, and at night had two £100 notes, a £20 note, a £10 note, and some gold; altogether £246 10s., besides a new £5 note. This money, with the exception of £2 10s. in gold, was deposited in his note-book, where, also, he had four checks, one for £55, two for £25, and one for £5, and his note-book was placed in a secret pocket on the inside of his waistcoat. The next day he proceeded to Bath for the purpose of attending the races. He went first to the Lion Hotel, but after being on the course returned with a friend named Forester to a bed which that gentleman had taken for him at the Royal Pump-room Hotel. In the evening, after dinner, he and Mr. Forester joined some friends at the Lion, and remained watching them play cards and betting small sums until past one o'clock, when they returned to the Pump-room Hotel, and on ringing the bell were admitted by the night porter. Their bedroom was a double-bedded one, No. 69; and it opened into a dressing-room, which also communicated with the corridor. Mr. Forester fastened the door, and plaintiff was in bed first. He hung his waistcoat with his coat over it, on the brass at the foot of the bedstead; but, afterwards, remembering that he had not wound up his watch, which was in his waistcoat pocket, he repossessed himself of his waistcoat, and, having wound up his watch, replaced it on the top of the coat. The bedstead on which he slept was within a couple of feet of the door, which opened upon it. He first awoke in the morning at a little before eight o'clock, and heard the occupants of the next room moving about. He went to sleep again and remained sleeping till a little before ten o'clock, when he opened the door and took in his boots and shaving-water. He had not a distinct memory, but believed that he himself turned the key back. He then shaved and was dressing himself, when he found that his waistcoat had been stolen, together with his note-book and money. He rang for the chambermaid, and desired her to send up the principal, Mr. Powle, and he being out, a policeman was called, and Captain Mutebury, the chief, sent for. The lock of the bedroom door was examined and found to be defective. The key would shoot the bolt, but the door having sunk, it only went against the brass, and not into the socket, so that the door could be

driving-box, and counted the bank-notes kept in it, in the presence of persons in the commercial room; and the box was so insecurely fastened that it might be opened without a key: held, the jury were warranted in finding the plaintiff guilty of gross negligence; though it was the custom of travellers to leave their driving-boxes

pushed open. On the doors of the dressing-room being examined, it was found that there were no keys or fastenings to them. The police arrested a man named Harvey, who had occupied the bedroom No. 67, and in the course of the day the waistcoat and note-book was found in another part of the hotel. The checks and some memoranda were still in the note-book, but all the notes were gone. Of course, nothing was found on Harvey, and the money had never been recovered.

The plaintiff was called to prove his case, as were the police-officers and other parties engaged, and it was elicited that the condition of the locks had been complained of by other guests.

Mr. Lopes, at the close of the plaintiff's case, submitted to his lordship whether there was any thing to go to the jury. He referred to the statute of 1863, by the provisions of which landlords of hotels who had complied with the terms of the statute were not liable for loss or damage to the goods of any guest beyond the sum of £30, which amount had been paid into court.

Mr. Justice Willes said that the loss of a guest's property was *prima facie* evidence of negligence on the part of the host, and unless rebutted would entitle the guest to recover. It was impossible for him in the present case to hold that there was no evidence of negligence to go to the jury.

Several witnesses were examined to prove that the notice under the act was duly posted up, and to suggest a certain amount of contributory negligence on the part of the plaintiff.

Mr. Justice Willes, in summing up, said to entitle himself to recover, the plaintiff must prove that the loss had been occasioned by negligence on the part of the defendants, and that he had not contributed to it by any act of his own. There could, of course, be no default unless there was a duty to take care, and the default was co-extensive with the duty. What was the duty of an innkeeper to his guests? In respect of rooms, was it not to supply them with proper and reasonable accommodation? Would it not be reasonable that the room should have a door, and that for security

the door should be provided with a proper lock or fastening? If the door had a defective lock, so that the guest went to bed with a sense of false security, was it not worse than having no lock at all? The learned judge then remarked on the proofs adduced, and

The jury returned a verdict for the plaintiff,—damages £224 10s. in addition to the £30 paid into court. *Standard*, 1870.

The obligation of an innkeeper is to protect the property of those whom he receives as guests. The place where the goods are deposited is not the test of responsibility; it is, whether they are in his custody, or at the risk of the guest. *Centlivre v. Ryder*, 1 Edm. Sel. Cas. 273.

In compliance with a notice, "Deposit your money and valuables in the safe at the office," a guest deposited a large amount of gold dust and coin. The clerk was knocked down, and the safe robbed, the lock not being turned. Held, the innkeeper was liable; judgment payable in gold. *Pinkerton v. Woodward*, 33 Cal. 557.

A clerk, intrusted with the key of the safe, procured another key to be made, with the knowledge of the innkeeper, which the clerk retained after his discharge, and the innkeeper made no change in the lock. After his discharge, the clerk, by means of the key, entered the safe and took money deposited there by a guest. At the time of the deposit, the guest was told that valuable packages would not be secure in the safe, as it had been robbed a few weeks before, and the innkeeper would not be responsible for any package or thing of value put in the safe, nor for money. Held, the innkeeper was responsible for the money. *Woodward v. Birch*, 4 Bush, 510.

The rule respecting a safe applies to a watch which the guest wears. *Stewart v. Parsons*, 24 Wis. 241. But see *Krohn v. Sweeney*, 2 Daly, 200.

A guest is not required by (Md.) Code, art. 70, §§ 5, 6, to deposit in the safe in the office of a hotel a sum of money reasonably necessary for travelling expenses. *Maltby v. Chapman*, 25 Md. 307. See *Wilkins v. Earle*, 3 Rob. (N. Y.) 352.

in the commercial room during the night.¹ So, in an action against an innkeeper for money contained in a valise; if, in concealing the fact that the valise contained money, and treating it as mere baggage, the plaintiff was guilty of gross negligence, the defendant is not liable.² So, if a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take, the landlord will not be responsible for its loss.³ So an innkeeper is held not answerable for the goods of his guest, which are lost, through the negligence of the guest, out of a private room in the inn, chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the time informed the guest that there was a key, and that he might lock the door, which he neglected to do.⁴ But a guest is not bound to keep his room locked at all times, to entitle him to recover for a robbery.⁵ (a)

§ 6. Where property is so deposited with an innkeeper, that he has a lien upon it for the keeping, he is also liable for its loss; where he has no such lien, he is not so liable. The lien and the liability stand and fall together.⁶ An innkeeper has a lien on baggage.⁷ And it is held, that an innkeeper may detain a horse brought by his guest, for his keep, against the owner of the horse; and need not show that he received it of a guest.⁸ So an innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with.⁹ (b) But where several persons travel

¹ 6 Eng. L. & Eq. 349.

² Fowler v. Dorlon, 24 Barb. 384.

³ Chamberlain v. Masterson, 26 Ala. 371.

⁴ Burgess v. Clements, 4 M. & S. 306.
See Mateer v. Brown, 1 Cal. 221.

⁵ Buddenburg v. Benner, 1 Hilt. 84.

⁶ Ingalsbee v. Wood, 36 Barb. 452.
See Manning v. Hollenbeck, 27 Wis. 202;

Nichols v. Holliday, 27 Wis. 406; Watson v. Cross, 2 Duv. 147.

⁷ Willard v. Reinhardt, 2 E. D. Smith, 148.

⁸ Yorke v. Grenaugh, 2 Ld. Raym. 867.

⁹ Snead v. Watkins, 37 Eng. L. & Eq. 384.

(a) Whether a guest's having laid down a pair of valuable gloves, under his overcoat, on a bar-room bench in the presence of the innkeeper, exonerated the innkeeper from liability for their loss; is a question for the jury in view of all the circumstances. Read v. Amidon, 41 Vt. 15.

Where a guest handed to the clerk his pocket-book for safe-keeping, containing \$136, which was on the same day stolen from the desk in the office; held, the guest was not guilty of negligence in not informing the clerk that there was money

in the pocket-book, and that the landlord was liable for its loss. Shoecraft v. Bailey, 25 Iowa, 553.

An innkeeper is not liable for the loss of baggage, carried away by one whom the owner has permitted to exercise acts of ownership over it, without informing the landlord of the true ownership. Kelsey v. Berry, 42 Ill. 469.

(b) A, who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by the plaintiff for a bill of costs. A put up at a public house, kept by the defendant, bring-

together and put up together at an inn, the goods of one cannot be detained for the board of all.¹ (a) And an innkeeper cannot detain the goods of a boarder.² (b)

¹ Clayton v. Butterfield, 10 Rich. Law, 300.

² Ewart v. Stark, 8 Ib. 423; Hursh v. Byers, 29 Mis. 469.

ing with him a bag, containing, amongst other things, a letter-book belonging to the plaintiff, and quitted without paying his bill, leaving the bag behind him. Held, the defendant had a lien upon the property. 37 Eng. L. & Eq. 384; 19 Com. B. 267.

(a) A father and his two daughters put up at an inn. The board of all was charged to the father, and he was sued for it, and, being held to bail, took the benefit of the Insolvent Debtor's Act. Held, the landlord had no lien on the trunk of one of the daughters and its

contents for the whole board due to him. 10 Rich. 300.

(b) It is held, that a *livery-stable keeper* has no lien, either for the keep of a horse standing at livery, or for money paid by him, at the request of the owner, for the attendance of a veterinary surgeon upon the horse. Orchard v. Rackstraw, 9 Com. B. 698.

A very late case in Massachusetts decides that the lien of a boarding-house keeper is not suspended until the board is payable, but attaches as and when the board is furnished. Smith v. Colcord, Sup. Court, Suffolk, March, 1874.

CHAPTER XLVI.

BAILMENT. — COMMON CARRIERS.

- | | |
|---|---|
| 1. Common carriers, who are. | 19. Notice, as affecting liability. |
| 7. Burden of proof. | 26. Custom or usage. |
| 8. To whom liable. | 27. Passenger-carriers. |
| 10. Delivery to. | 28. Liability for baggage. |
| 11. Delivery by. | 30. Injury caused by the passenger's own fault. |
| 13. Nature of liability; exception of the act of God, &c. | 32. Ferries. |
| 18. Form of action against — <i>trover</i> . | 33. Lien. |

§ 1. ANOTHER form of bailment is that termed *locatio operis mercium vehendarum*; involving the important subject of the rights, duties, and liabilities of *common carriers*.(a)

§ 1 a. To make a person a common carrier, he must exercise the business as a public employment for hire,(b) not as a casual occupation, *pro hac vice*; he must undertake to carry goods for persons generally, or all who choose to employ him, though it need not be his *usual* occupation.¹ A person whose business is not the carrying of goods, and who does not hold himself out to the world as such, will not be regarded as a common carrier, although he may occasionally carry goods for hire; and, in case of loss, will be responsible only as an ordinary bailee.² But, as a planter, employing his wagons in hauling his cotton crop to market, and habitually lading them on their return trips with goods to be transported for hire, receives such goods and executes his receipt therefor, under-

¹ Self v. Dunn, 42 Geo. 528; Fish v. Chapman, 2 Kelly, 349; 18 Tex. 498; Gisbourn v. Hurst, 1 Salk. 250; Russell v. Livingston, 19 Barb. 346. See Mershon v. Hobensack, 2 Zabr. 372; Campbell v.

Perkins, 4 Seld. 430; Liner v. Johnson, L. R. 7 Exch. 267; Fish v. Clark, 2 Lans. 176.

² Samms v. Stewart, 20 Ohio, 69; Shaw v. Davis, 7 Mich. 318.

(a) See Russ v. Steamboat, 14 Iowa, 363; Shirley v. Billings, 8 Bush, 147. The liability of a common carrier as for a tort, rather than a contract, is well illustrated by the decision, that an action may be maintained against him, though the contract was made on Sunday. Merritt v. Earle, 29 N. Y. (2 Tiffa.) 115.

(b) It is held that a carrier is not liable, as such, unless freight is paid, though in possession of the goods. Stewart v. Bremer, 63 Penn. 268.

T. gratuitously undertook to receive

\$1500 for C. at N., and to deliver it to him at W., where they both resided. After drawing the money T. went to a public fair, where he met E., a townsman, who was going home before he was. T., stepping a little aside from the crowd, gave E. the money to carry to C. On his way home, while in a crowded car, E. had his pocket picked of the money. Held, T. was liable for the loss, as he had violated his trust, was guilty of a conversion of the property, and of gross negligence. Colyar v. Taylor, 1 Cold. 372.

taking to deliver them to the consignee in good order and without delay at the customary rate of charges, he will be responsible as a common carrier.¹ So it is held, that, if one contracts specially to carry goods to a particular place, and deliver them in "good order and condition, unavoidable accidents only excepted," he is liable as a common carrier, although not one. And even though not to be paid therefor.² (a) And where persons receive goods as carriers, and give a receipt and bill of lading, it is not competent for them to show, by parol testimony, that they are not common carriers, for the entire distance stated in the bill of lading.³ And one, who holds himself forth to the public to carry for hire, is a common carrier as much in his first trip as in his second, third, or fourth.⁴ (b) So a common carrier, from a place within to a place

¹ Harrison v. Roy, 39 Miss. 396.

² Coggs v. Bernard, 2 Ld. Raym. 909; 1 Com. 133; 2 Kelly, 349. See Hannibal v. Swift, 11 Am. Law Reg. 126.

³ Chouteaux v. Leech, 18 Penn. 224;

American v. Hockett, 30 Ind. 250; Southern v. Newby, 36 Geo. 635. See Whitney v. Merchants', 104 Mass. 152; Holladay v. Kennard, 12 Wall. 254.

⁴ Fuller v. Bradley, 25 Penn. 120.

(a) Where the defendant owned a sloop, and was specially employed by the plaintiffs to make two trips to carry grain; held, not a common carrier. Allen v. Sackrider, 37 N. Y. 341.

A gratuitous carrier is liable if he deposit in a place peculiarly unsafe on account of an expected raid of hostile soldiers. Adams v. Cressap, 6 Bush, 572.

A carrier is responsible for return of empty bags, under an agreement that such bags shall be returned without charge. Pierce v. Milwaukee, 23 Wis. 387.

(b) Where the master of a vessel, engaged chiefly in carrying naval stores between a port in North Carolina and the city of New York, took in charge a box of jewelry, without including it in a bill of lading, and without any contract as to the price for carrying it; held, he was only liable as an ordinary bailee, and not as a common carrier, and having kept it in his cabin, locked up in his chest, and having been violently robbed of the property, with his own, in the night-time, he was not guilty of negligence, and not liable for the value of it; that the nature of this bailment did not bind the defendant to a direct voyage from the one port to the other, so as to subject him for a deviation. Pender v. Robbins, 6 Jones, 207.

Proof of the usage of the clerks of steamboats, to receive and carry packages from one port to another, without hire, in the expectation that such boat

would be preferred by the parties in their shipments of freight, is insufficient to bind the owners; first, because no certain or fixed standard of remuneration is shown, nor that the consignee of the package would be liable to make any return for the risk and labor incurred; and, second, because it is not shown that such usage had grown up with the consent of the owners of vessels, or that it was more than a mere accommodation usage. Cincinnati, &c. v. Boal, 15 Ind. 345.

The uncontradicted testimony of a witness, that he had done business with the defendants for about nine or ten years, and that "they did business as common carriers with all that called," establishes, *prima facie*, that they are common carriers. Haslam v. Adams, &c., 6 Bosw. 285.

Where a farmer assumes the business of a carrier at certain seasons of the year, he does not necessarily incur the responsibilities of a common carrier, as to all contracts for the transportation of goods made at other seasons and under special circumstances.

It is for the jury, in such case, under the direction of the court, to find whether he is a carrier or not. Haynie v. Baylor, 18 Tex. 498.

The defendants, whose usual business was farming, during the season of hauling, employed a team in transporting goods between two places. The plaintiff delivered to them a quantity of cotton to be transported; and, while on the way,

without the realm, is subject to the same liabilities as one who carries only within the realm.¹

¹ *Crouch v. London, &c.*, 25 Eng. L. & Eq. 287.

some of the ropes broke and the bales burst, and, on one night, the wagon with the cotton was placed within fifteen feet of the camp-fire, which was renewed at midnight, but at both times there was no wind. In the morning the cotton was found to be on fire, the wind having arisen and blown the fire upon the cotton. Held, that the defendants were liable as common carriers for the loss of the cotton. *Chevalier v. Straham*, 1 Tex. 115.

The keeper of a public house, in the neighborhood of a railroad station, having given public notice that he would furnish a free conveyance to and from the cars to all passengers, with their baggage, travelling thereby, who should come to his house as guests, and for this purpose having employed the proprietors of certain carriages to take all such passengers, free of charge, to them, and to convey them and their baggage to his house: if a traveller by the cars, to whom this arrangement is known, employ one of the carriages thus provided to take him and his baggage to such public house, and his baggage is lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver; the keeper of the house will be liable therefor. *Dickinson v. Winchester*, 4 Cush. 114.

The owner of a *toll-bridge* is not a common carrier. *Grigsby v. Chappell*, 5 Rich. 443.

Mere notice will not change a common into a private carrier. *Kimball v. Rutland, &c.*, 26 Vt. 247.

It is a question of law. *Ibid.*

Where the declaration in an action against a railroad corporation, for a personal injury to one of the plaintiffs, after stating that the defendants were the owners of a certain railroad, running through the towns of W. and P., and of certain cars for the conveyance of passengers upon that road, averred, that, on the day specified, the defendants were the owners of, and were running and propelling, upon said road, a certain train of passenger cars, for a certain reasonable reward paid to the defendants: it was held, that it sufficiently appeared from the declaration, that the defendants were common carriers; and that it was not necessary to allege that the defendants had power by their charter to become carriers; for, be-

ing engaged in this business, and having, in its pursuit, made a contract pertaining to it, they ought not to be allowed to say to the contracting party, that they had no power to do so. *Fuller v. Naugatuck, &c.*, 21 Conn. 557.

A, the keeper of a coach-office, and a part-owner in several coaches, made a contract with B, for the carriage of parcels which he was in the habit of sending from that office to various places. Held, this bound the owners of all the coaches in which A was a part-owner; as well those who became partners after the making of the contract, as those who were so before. *Helsby v. Mears*, 5 B. & C. 504.

Hoymen, ferrymen, and masters of ships, who carry goods for hire, are common carriers. *Mors v. Sluce*, 1 Mod. 85; *Griffith v. Cane*, 22 Cal. 534.

A public ferryman is a common carrier; and a private ferryman, not on a public road, may yet incur the liabilities of a common carrier, by notoriously undertaking to transport, for hire, all persons indifferently, with their carriages and goods. *Hall v. Renfro*, 3 Met. (Ky.) 51. See § 32.

If horses start and run overboard, while on a ferry-boat, which has not sufficient barriers, the ferryman is *primâ facie* liable, as he is a common carrier, and the horses are in his possession; it is upon him to show that the loss arose from inevitable accident, &c., or that the driver expressly or impliedly undertook to keep them safely. *Powell v. Mills*, 37 Miss. 691.

Where the driver left the coach-box, tying the reins to it, and proceeded to water the horses, and was carried into the river by them; held, he did not undertake to keep them, and was probably carried overboard, not in the performance of such a duty, but in the effort to aid the ferryman in performing his duty. *Ibid.*

Held, the accident did not happen from any "natural infirmity" in the property carried; that this phrase applies only to articles liable to decay, evaporation, &c., or to articles improperly packed, which are liable to injury without any fault of the carrier; that by proper care, as by erecting suitable barriers, the carrier could convey horses safely. *Ibid.*

Held, that it was error to instruct the

§ 2. So *railroad corporations* are common carriers; and very many of the cases, relating to the various points connected with this general subject, are actions brought against such corporations. It is held that they are estopped by their charters to deny this liability.¹ And a private arrangement between a railroad company and an expressman does not relieve it from its liability as a common carrier.² (a) So the owners and master of a *ship* or *steamboat* (b) are liable as common carriers, except so far as their liability is limited by the bill of lading or charter-party, and by statute.³ Thus the owners of a steamboat, employed in carrying goods for hire between Charleston and Columbia, in South Carolina, are common carriers.⁴ So the master of a steamboat, plying on a navigable river, is presumed to be a common carrier; and, in an action against him as such, the burden is on the defendant to show the contrary, although the declaration only alleges that the defendant is master of a certain steamboat, without alleging that

¹ Virginia, &c. v. Sanger, 15 Gratt. 230; Parker v. Great, &c., 7 Man. & Gr. 253; Jones v. Western, &c., 1 Wms. 399; Fuller v. Naugatuck, &c., 21 Conn. 557, 570; Redf. on Railw. p. 235, § 125; Mal-lory v. Tioga, &c., 39 Barb. 488.

² Langworthy v. New York, &c., 2 E. D. Smith, 195.

³ Brown v. Clayton, 12 Geo. 564.

⁴ Swindler v. Hilliard, 2 Rich. 286.

jury, that, if the accident was caused by the negligence of the plaintiff or his driver, he could not recover, as there was no proof of negligence. *Ibid.*

Held, that an instruction that the defendants were not liable, if the jury believe that there was no intention to trust them with the property whilst in the boat, and that the plaintiffs were in the habit of placing their own drivers on the boat by whom the coach was exclusively managed and controlled, was likewise bad, as leaving it to the jury to draw, from the fact that the driver had the general control, the unwarrantable presumption that he thereby assumed all control and responsibility. *Ibid.*

(a) If a railroad company loan some of its cars to an individual, who loads them himself and in his own way, the company is not liable as a common carrier, for any injury to the property in such cars, arising from imperfect loading. *East Tennessee, &c. v. Whittle*, 27 Geo. 535.

Parol evidence, that a railroad corporation established by law in another State has held itself out, through its agents, as a common carrier over a railroad in Massachusetts, is sufficient *prima facie* evidence of its capacity to contract

for such carriage, to maintain an action against it for the loss of merchandise intrusted to it. *McCluer v. Manchester, &c.*, 13 Gray, 124.

A railroad corporation which has leased a portion of another railroad, connecting with its own, is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by an agreement with the proprietors of that road, by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first. *Ibid.*

A railroad corporation cannot dispute their liability of freight delivered to them to be carried over a railroad leased to them, on the ground that the lease is void. *Ibid.*

Railroad receivers liable as carriers in their own State, are also liable as such in another State. *Paige v. Smith*, 99 Mass. 395.

(b) So notwithstanding an act of Congress designed for additional safeguard, and a compliance therewith. *Caldwell v. New Jersey*, 47 N. Y. 282; *Swarthout v. New Jersey*, 48 N. Y. 209.

he is a common carrier.¹ And the owners of a steamboat are liable for bank-bills, sent in a letter, intrusted to the captain, and not delivered by him, although no compensation for carrying is agreed upon; unless the party sending the bills knew that the captain was exceeding his powers in taking them.² (a) But a steamboat

¹ *Bennett v. Filyaw*, 1 Branch, 403.

² *Chouteau v. Steamboat, &c.*, 11 Mis. 226.

(a) The defendants, a corporation, were common carriers upon Lake Champlain, and their charter extended to the carrying of all goods, wares, and merchandise, and "all other articles and things usually transported by water" on that lake. Bank-bills were usually carried by the water-craft upon that lake, at the time the corporation received their charter and went into operation. Held, the defendant's powers, as a corporation, extended to the carrying of bank-bills, though the charter did not of necessity constitute them common carriers of bank-bills, so as to preclude them from the right of declining to carry them. And it is not necessary, in such case, to show, by positive proof, that the company consented that the captain of their boat should carry money on their account. The captain is the general agent of the owners; and *prima facie* they are liable for all contracts for carrying, made by the captain or other general agent, for that purpose, within the powers of the owners themselves; and the burden rests upon them to show, that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. The mere fact, that the captain was by the company permitted to take the perquisites for carrying such parcels, will not exonerate the company. But it is not competent for the plaintiff, in order to charge the company, to prove by his agent, who delivered the package to the captain that he intended to intrust the money to the captain in his official, and not in his private capacity, — without evidence that this was in some way made apparent at the time. *Farmers', &c. v. Champlain, &c.*, 23 Vt. 186. See 16 Mis. 216.

Whether a *tow-boat* is a common carrier, seems somewhat doubtful. See 2 Hilliard on Contracts, 331, § 14; *Arctic v. Austin*, 54 Barb. 559. The prevailing rule would seem to be in the negative.

When a steam-tug assumes control of the tow and its crew, and to give the orders necessary, the time and the suffi-

ciency of the orders fall within the duty of the tug. If they are insufficient or are given too late, it is negligence on the part of the tug. *Hays v. Paul*, 51 Penn. 134.

If the character and loading of a flat-boat are visible, it is culpable negligence on the part of a tow-boat captain to undertake to tow such flat-boat if too heavily loaded, or if containing too much water to be towed with safety. *Ibid.*

The owners of a tow-boat, undertaking to tow another boat, are, in the absence of an express contract limiting their liability, bound to exercise ordinary care and diligence. When A, a carrier of goods, employs a tow-boat to tow his vessel, and those in charge of the tow-boat are guilty of negligence, whereby damage is done to the goods; and A has not excepted in his contract such risks: he is liable to the owners of the goods, as for the acts and neglects of his agents. Hence he may maintain an action against B, the proprietor of the tow-boat. In such an action B cannot claim any deduction for so much of the loss as was covered by insurance. *Merrick v. Brainard*, 28 Barb. 574. See *Ashmore v. Pennsylvania, &c.*, 4 Dutch. 180.

The master of a canal-boat, laden with merchandise, being in the city of New York, obtained from the defendants, who had been engaged for several years in towing vessels upon the Hudson River by means of steamboats, a permit in the following words: "Captain A, of steamboat B, take in tow for Albany canal-boat C, &c., at the risk of the master and owners thereof, and collect \$30." The permit was delivered to Captain A, who accordingly took the canal-boat in tow, the master and hands remaining on board in charge of the boat and her cargo; and, while proceeding up the river in the night-time, she was run upon a rock, and, with her cargo, was lost. In an action for the loss, on the ground of unskilfulness or want of care in the navigation; held, whether the defendants were common carriers of the canal-boat and her cargo, or not, they were liable for gross neg-

is not liable as a common carrier, unless the carriage of the goods was undertaken for hire.¹ And the owners of a steamboat employed to tow other boats and rafts are held not common carriers.²

§ 3. A *ferryman* is held a common carrier ;³ if holding himself out for general employment.⁴ (See § 32, p. 546, n.)

§ 4. The law of common carriers is strictly applicable to *express companies* ;⁵ (a) although it has been sometimes held, that expressmen, who forward goods from place to place for hire, in conveyances owned by others, are not liable as common carriers, but as bailees for hire to forward goods by the ordinary modes of conveyance, and have a legal right to define the extent of their liability.⁶ (b)

¹ Chouteau v. Steamboat, &c., 16 Mis. 216.

² Leonard v. Hendrickson, 18 Penn. 40 ; Wells v. Steam, &c., 2 Comst. 204 ; Abbey v. Stevens, 22 How. (N. Y.) 78.

³ Smith v. Seward, 3 Barr, 342.

⁴ Wilson v. Hamilton, 4 Ohio, 722. See Smith v. N. Y., 29 Barb. 132.

⁵ Stadhecker v. Combs, 9 Rich. 193 ; Southern v. M'Veigh, 20 Gratt. 264 ; Gulliver v. Adams, 38 Ill. 503.

⁶ Hersfield v. Adams, 19 Barb. 577. But see Reed v. Spaulding, 5 Bosw. 395 ; Place v. Union, 2 Hilt. 19.

lect. Alexander v. Greene, 7 Hill, 533. See Wells v. Steam, 2 Comst. 204.

The defendant contracted with the plaintiff, to forward certain goods from New York to Ohio by steam ; the defendant being owner of a line of boats on the canal, though he owned none on Lake Erie. The goods were sent on the lake by a sailing vessel, and were lost. Held, the defendant was liable for the whole route as a common carrier. Wilcox v. Parmelee, 3 Sandf. 610.

The master of a steamboat contracted with the plaintiff, to transport merchandise from A to B, within a reasonable time after its delivery at A. Owing to a fall of the river Missouri, the master could not navigate it with his own boat for two months, during which time merchandise was delivered at A. The river, in the mean time, was navigable by smaller boats. Held, the master was not excused for delaying to transport the merchandise, until the river was navigable by his own boat. Collier v. Swinney, 16 Mis. 484.

(a) Though styling themselves "express forwarders." Christenson v. American, 15 Minn. 270. See Mercantile v. Chase, 1 E. D. Smith, 115 ; Krender v. Woolcott, 1 Hilt. 223.

(b) See Southern v. Crook, 44 Ala. 468 ; Fitzsimmons v. Southern, 40 Geo. 330 ; Thompson v. Fargo, 58 Barb. 575 ; Howard v. Wile, 64 Penn. 201 ; Southern v. Womack, 1 Heisk. 256.

Where expressmen, engaged in forwarding

goods to California by others' boats and vessels, received two trunks of goods to be transported, contracting to be liable for no loss except from the fraud or gross negligence of them or their agents or servants, and the goods were injured by the sinking of a boat in the Chagres River, and examined by surveyors and sold at auction ; held, the expressmen were not liable for damages previous to the sinking of the boat, and were not guilty of gross negligence in not forwarding the damaged goods to California, the captain of the boat, as common carrier, having control of the goods when in his possession ; and that the expressmen were only liable for the amount the goods sold for, the advanced freight, and interest. 19 Barb. 577.

The owners of goods, delivered to an express and forwarding line, are bound by any contract in force between the forwarders and the common carriers whom they employ. They therefore cannot maintain any action against such carriers, except what could have been maintained by the forwarders. Stoddard v. Long Island, &c., 5 Sandf. 180.

An express must deliver goods personally. Witbeck v. Holland, 45 N. Y. 13 ; 55 Barb. 443.

Express companies are not warehousemen, like carriers, after arrival. Sullivan v. Thompson, 99 Mass. 259.

But usage as to the mode of delivery will control. Ibid.

And the consignee is bound, after no

§ 5. It is not necessary, to constitute one a common carrier, that a stipulation should be entered into as to the amount of freight. But there must be a right to compensation, though without this there may be the responsibility of a *mandatary*.¹ Thus a hackney-coachman is not liable for the loss of goods, for the carriage of which he is not paid.² (a)

§ 6. A common carrier is required by law to perform the duty which he assumes, and is liable for any damage resulting from a refusal to perform it. He has no general right to refuse to receive a passenger, or a parcel tendered to him for conveyance, unless informed of the nature of its contents. Thus a railway company acting as common carriers, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of

¹ Knox v. Rives, 14 Ala. 249.

² Upshare v. Aidee, 1 Com. 24.

tice, to be ready to receive. Adams v. Darnell, 31 Ind. 20.

An express company, whether a common carrier or warehouseman, is bound to deliver a package to the right person. American v. Stack, 29 Ind. 27.

And is liable for loss after arrival. American v. Hockett, 30 Ind. 250.

An express company cannot, by notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability for loss through its negligence. Belger v. Dinsmore, 51 Barb. 69.

A package delivered to an express was marked C.O.D. \$292, as appeared from the receipt given by the company. The receipt also provided that articles so delivered should be valued under fifty dollars, unless otherwise stated therein. Held, the company had sufficient notice of the value, and were liable for the full amount. Van Winkle v. Adams, 3 Rob. 59.

Express companies are liable as common carriers, whether the property is received directly from the owners, or from another company to whom it was originally delivered. It is not essential that they should have given a receipt. Gulliver v. Adams' Ex. Co., 38 Ill. 503.

If the agent of an express company abstracts a parcel while in the act of delivering it, this is no delivery, and the company will be liable even though a receipt is signed and the form of delivery gone through, by the agent's laying the property for a moment out of his hands. American v. Haggard, 37 Ill. 465.

A package of money sent by express

to the plaintiff was never received, but was receipted for by his clerk, A, through mistake. B, the father of A, on being apprised of the circumstances, paid the amount of the loss to the plaintiff. Held, this payment was not for the benefit of the express company, and discharged no right of action against them. The plaintiff might still sue them for the money, for the use of B. American v. Haggard, 37 Ill. 465.

(a) Gold dust was taken on board the steamer New World, to be carried gratuitously from Sacramento to San Francisco, the clerk of the boat having given the owners of the dust actual notice, that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred. The gold dust was stolen from the boat, without any negligence on the part of its officers. Held, the owners were not liable. Fay v. Steamer, &c., 1 Cal. 348.

In an action by the consignor of goods against a carrier for non-delivery, if the plaintiff aver that the defendant undertook to deliver, &c., in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee is no variance; the consignor being by law liable. Moore v. Wilson, 1 T. R. 659.

The consignee of goods, who is ready to pay freight on having the goods delivered to him, may, without any tender, maintain trover against the carriers or their agents, who, having no legal claim on the goods for any thing besides the freight, refuse to deliver them, unless a further sum is first paid. Adams v. Clark, 9 Cush. 215.

goods, which in practice affects one individual only.¹ In general, the law requires of a common carrier equal privileges for all applicants.² Though it is held that a railroad is not necessarily required to transport *cattle*.³ And a railroad is bound to furnish reasonable and ordinary facilities for transportation, though not to provide in advance for extraordinary occasions, or an unusual influx of freight.⁴ So it is held, in an early case, that an action lies against a common carrier for refusing to carry money, if he do not assign a particular reason for it.⁵ So one who holds himself out as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common-law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between those limits.⁶ The plaintiff must prove a tender of, or readiness to pay, freight.⁷ (a) Slight evidence, however, is sufficient. And it may

¹ Crouch v. London, &c., 25 Eng. L. & Eq. 287; 14 Com. B. 255; 18 Ill. 488.

² Keeney v. Grand, 59 Barb. 104.

³ Michigan v. M'Donough, 21 Mich. 165.

⁴ Galena, &c. v. Rae, 18 Ill. 488.

⁵ 12 Mod. 3; Lane v. Cotton, Ib. 472.

⁶ 14 Com. B. 255; Galena, &c. v. Rae, 18 Ill. 488.

⁷ Galena, &c. v. Rae, 18 Ill. 488.

(a) In declaring against a *common carrier of passengers* for refusing to carry, there must be an averment that the plaintiff offered, or was ready and willing, to pay the fare. Day v. Owen, 5 Mich. 520.

A railroad will not be excused from transporting goods, by the fact that a connecting company might fail to have the necessary cars and hands to receive and carry them forward. East v. Nelson, 1 Cold. 272.

If a carrier has reasonable grounds for not receiving goods offered him for transportation, he may do so; but, if he once receives them, he becomes an insurer. Porcher v. North, 14 Rich. (S. C.) L. 181.

The nature of the property offered for transportation may of course affect the rights and liabilities of the carrier with reference to it. The carrying of *animals* by railroads has given rise to numerous questions and decisions. Some of the latest are as follows:—

A railroad is not responsible for injury to animals occasioned by the fault of the owner. Blower v. Great, Eng. L. R. 7 C. P. 655; Kendall v. London, L. R. 7 Exc. 373.

In an action for injury and delay in transporting live cattle, to be delivered at market on a particular day, the rule of damages is the difference between the market value in good condition at the

time when they ought to have arrived, and of that in their injured condition at the time they did actually arrive. Smith v. New Haven, 12 Allen, 531.

A railroad transporting live animals is bound to furnish cars sufficiently strong to resist their struggles, though vicious and unruly; but is not liable if the injury results from the conduct of the animals alone, if it provided suitable cars and exercised due care. Ibid.

Where, with notice, cattle are loaded upon cars provided for their transportation, it is the duty of the company to carry them by the first train, if they are loaded in time. Illinois v. Waters, 41 Ill. 73.

If the owner of live-stock shipped by railroad, who undertakes to secure them in the cars, finds that the door is weak and unsafe, and does not inform the station agent to whom the defect is unknown, the company is not responsible for any loss or damage that may arise from that cause. Betts v. Farmers', 21 Wis. 80.

See Indianapolis v. Mustard, 34 Ind. 50; Jones v. North, 67 N. C. 122; Squire v. N. Y., 98 Mass. 239; Hawkins v. Great, 17 Mich. 57; Illinois v. Adams, 42 Ill. 474; Cleveland v. Perkins, 17 Mich. 296; Chicago, &c., R. Co. v. Van Dresar, 22 Wis. 511; Great v. Hawkins, 18 Mich. 427; McDaniel v. Chicago, 24 Iowa, 412.

be presumed from surrounding circumstances. And prepayment is not necessary, unless required.

§ 7. In an action against a common carrier for loss of goods, it is necessary to prove that he was a common carrier, as well as that the goods were not delivered.¹ Also the condition of the goods, either directly or presumptively, when delivered.² And the receipt is not conclusive as to their condition.³ But an allegation of gross negligence need not be proved.⁴ Proof of delivery of goods to a common carrier, and of a demand and refusal of the goods, or of such loss of goods as rendered a demand useless, throws the burden of proof on the carrier, to show delivery, or that the loss of goods happened by dangers for which he is not liable.⁵ (a)

§ 8. It is held that the action against a carrier for loss of goods must be brought by the *owner*.⁶ The consignee may maintain an action, especially where there is no evidence of ownership in the consignor.⁷ And it is no answer, that the goods were delivered to the defendants by A, who, as consignor, claimed compensation for the loss, and that the defendants paid him, as such consignor, without notice that he was the agent of the plaintiff, and believing that he delivered the goods on his own account, and was the person entitled to sue.⁸ But though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action, yet, if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor

¹ Ringgold v. Haven, 1 Cal. 108.

² Smith v. N. Y., &c., 43 Barb. 225.

³ Tarbox v. Eastern, &c., 50 Me. 339.

⁴ Sargent v. Birchard, 11 Am. Law Reg. 53.

⁵ Lewis v. Smith, 107 Mass. 334; Van Winkle v. South, 38 Geo. 32; Mary, 1 Abb. (U. S.) 1; Chapman v. N. O., 21 La. Ann. 224; Emm v. Johnson, Sprague, 527; Western, &c. v. Newhall, 24 Ill. 466; Tar-

box v. Eastern, &c., 50 Me. 339; Alden v. Pearson, 3 Gray, 342. But see Williams v. Holland, 22 How. (N. Y.) 137. See, also, Tardos v. Tonlon, 14 La. Ann. 429.

⁶ 2 E. D. Smith, 317. See Patterson v. Moore, 34 Penn. 69; Southern v. Caperton, 44 Ala. 101.

⁷ Arbuckle v. Thompson, 37 Penn. 170.

⁸ Coombs v. Bristol, &c., 3 Hurl. & Nor. 1.

(a) In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby the consignor lost his goods; it is not sufficient to prove that they never reached their destination or were never accounted for. The office-keeper's duty is to deliver to a carrier, and some evidence must be given, showing specifically a breach of that duty. *Gilbart v. Dale*, 5 Ad. & Ell. 543.

But where, in case against a carrier, for the loss of goods delivered to him at Dublin, to be conveyed to Liverpool, it was objected for the defendant, that, unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void; held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sissons v. Dixon*, 5 B. & C. 758.

may maintain the action, though the goods may be the goods of the consignee. And the question, whether in fact goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee.¹ The legal presumption is, that the consignee is the owner.² Thus the traveller of M., a tradesman, residing in London, verbally ordered goods for M., of the plaintiff, a manufacturer at Paisley. No order was given as to the sending the goods. The plaintiff gave them to the defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by the defendant's negligence; held, the defendant was liable to the plaintiff.³ (a) The consignor of property has a right to change the destination before it is delivered, even where the consignee has accepted bills on the strength of the consignment; and a refusal of the carrier to comply is evidence of a conversion.⁴

§ 9. A mere *bailee* of goods may maintain an action for the loss of them against a carrier. Thus a laundress sent linen, which she had washed, to the owner, by a carrier, whom she paid. The carrier having lost it; held, that the laundress was entitled to sue the carrier for the loss.⁵ (b)

¹ Dunlop v. Lambert, 6 Clark & Fin. 600; Davis v. James, 5 Burr. 2680; W. & A., &c. v. Kelly, 1 Head, 158; Hooper v. Chicago, 27 Wis. 81. See Green v. Clark, 5 Denio, 497.

² Ogden v. Coddington, 2 E. D. Smith, 317.

³ Coats v. Chaplin, 3 Ad. & Ell. N. S. 483; 2 Gale & Dav. 552.

⁴ Lewis v. Galena, 40 Ill. 281.

⁵ Freeman v. Birch, 3 Ad. & Ell. N. S. 492, n.; Moran v. Portland, &c., 35 Me. 55; 1 Nev. & M. 420.

(a) As to a *joint* action, see Metcalfe v. London, &c., 4 C. B. N. S. 313.

(b) On the other hand, the special property of the carrier, as a *bailee*, is sufficient to sustain an action of *trover* brought by him against a third person. More especially, if, in consequence of non-delivery, the carrier has agreed to pay for the goods. Maine Stage Co. v. Longley, 2 Shep. 444.

In such an action, it is held that he may recover the value of the goods, which he will hold in trust for the owner. Merriek v. Brainard, 38 Barb. 574. Reversed 34 N. Y. 208.

So a carrier, though he have not received freight, or paid the loss, may yet recover damages from another who has caused a loss. White v. Bascom, 2 Wms. 268.

The plaintiffs, common carriers,

brought to New York barrels of whiskey belonging to P., and consigned to D. & Co. In delivering a quantity of whiskey, subsequently, to the defendants, on an order of H. & Co., they by mistake delivered them these barrels. On discovering the mistake, they demanded the whiskey of the defendants, which the defendants refused, or to pay for it. The plaintiffs paid D. & Co., as agents of P., the value of the whiskey, and took their receipt, and thereupon repeated their demand, and the defendants again refused. Held, the plaintiffs might maintain either an action of *tort*, for conversion, or an action for the value of the property, on an implied contract. Hudson River, &c. v. Lounsbury, 25 Barb. 597.

A person who, at the request of a friend upon his death-bed, promises him, in case he dies, to send his body home to

§ 10. In order to charge a common carrier for the loss of property, it is in general necessary that it should be delivered to him, or his agent, for transportation; delivery on his premises is not enough. But such delivery may be either actual or constructive. If he agree that the property may be deposited at a particular place without any express notice to him, such deposit amounts to constructive notice, and a sufficient delivery. And such agreement may be shown, by proof of a constant practice and usage by the carrier, thus to receive property. Thus, where goods are delivered in the usual manner, for transportation, by a carrier, on his private dock, used exclusively for this purpose; it is held that such delivery renders him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such delivery. And where the defence is placed solely on the ground of a want of notice to him of delivery; the court may properly rule that the delivery, if in accordance with the usage, was sufficient, without submitting to the jury the question of fact, whether such usage influenced the plaintiff in his conduct.¹ The principle is that, if the deposit of goods in the carrier's warehouse is a mere *accessory to the carriage*, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods.² And any arrangement made between a carrier and his servant, by which the servant is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of them, unless such arrangement is known to the owner thereof, so that he contracts exclusively with the servant.³ So where a

¹ Grosvenor v. N. Y., 39 N. Y. 34; Southern v. Newby, 36 Geo. 635; Merriam v. Hartford, &c., 20 Conn. 354; Trowbridge v. Chapin, 23 Ib. 595. See Handlong v. Barnes, 1 Vroom, 69; Swetland v. Bos-

ton, 102 Mass. 276; Rogers v. Long, 2 Lans. 269; Wade v. Wheeler, 3 Lans. 201.

² Clarke v. Needles, 25 Penn. 338.

³ Mayall v. Boston, &c., 19 N. H. 122.

be buried with his mother; and, after his death, obtains a coffin from the city, and purchases a box in which to forward it, and puts the coffin with the body into the box, and ships them on board a vessel; and pays to the owners of the vessel the price for which they have agreed with a sister of the deceased, since his death, to carry the body, if enclosed in such a box, to the desired place, of which agreement the sister has informed him: cannot maintain an action against the owners of the vessel for neglecting so to carry, without further proving a special contract with him to do so. Driscoll v. Nichols, 5 Gray, 488.

"The plaintiff had no legal interest in this dead body, by reason of which he could maintain this action against a carrier without proof of a special contract with himself. And there was in our opinion no evidence in the case, which would have warranted a jury in finding such special contract. There was no agreement, or even request, to carry the box without the body. The one is but the incident of the other, and cannot be severed from it. For taking it without the corpse, the defendants would have been clearly liable in trover." Per Thomas, J., Ib. 492.

corporation have a general agent, employed for the purpose of receiving and transporting merchandise for hire, and held out to the world as invested with authority for this purpose; if goods are delivered to him, to be transported in the way of his duty, the corporation will be liable.¹ So goods bought in Connecticut, and delivered by the vendor on board a vessel at New York to be carried to England, were receipted for, the receipt specifying the price of freight, but, before bills of lading were executed, and before the ship sailed, she was burnt, with the goods on board, without any actual negligence of the ship-owners. Held, they were liable, as common carriers.² But where common carriers set up to carry certain kinds of property from one given point to another, they cannot be compelled to receive such property at intermediate points; and, if an agent in their employ receives property at an intermediate point, his right so to receive it is a proper subject of inquiry in an action against his principals, for the agent's failing to deliver property so received; and it is erroneous not to admit evidence upon that point.³ (a) And if any thing remains to be done by the consignor of goods or his agents, after their delivery to a railroad company, before they are ready for transportation, the company are only responsible for them as warehousemen.⁴ So delivery to the deck hands of a steamboat is insufficient, without proof that they were authorized to receive freight, or that the delivery was in pursuance of some contract or

¹ Mayall v. Boston, &c., 19 N. H. 122.

² Lakeman v. Grinnell, 5 Bosw. 625.

³ Thurman v. Wells, 18 Barb. 500.

⁴ Judson v. Western, &c., 4 Allen, 520.

(a) See *Forbes v. Davis*, 18 Tex. 268; *Michigan, &c. v. Meyres*, 21 Ill. 627. Suit against the S. C. Railroad Co. for cotton lost. Proof, that the cotton was delivered to an interior railroad company, terminating at the interior end of the defendant's railroad, and consigned to a firm in Charleston, but no proof that it came into the possession of the defendants, nor that the two roads were joint contractors. Held, insufficient. *S. C. Railroad Co. v. Bradford*, 10 Rich. 307.

A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the

guard. After several intermediate stoppages, the train reached London, when the parcel was missed. Held, no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern, &c. v. Rimell*, 37 Eng. L. & Eq. 245.

As to liability for fire, see *Watts v. Boston*, 106 Mass. 466.

Whether receipt of goods by a ticket agent binds the company, see *Rogers v. Long*, 38 How. (N. Y.) 289; *Burroughs v. Norwich*, 100 Mass. 26.

Whether delivery to the carrier constitutes him a warehouseman, see *Baron v. Eldredge*, 100 Mass. 455.

If goods delivered to a railroad are detained at the request of the consignor, the liability of the company, during such detention, is that of warehousemen only. *St. Louis v. Montgomery*, 39 Ill. 335,

usage ; although the manner of reception by the hands was such, that the officers, having the duty of receiving freight, must have known of the delivery, with reasonable care.¹ So a railroad company are not liable as common carriers, for property deposited in their warehouse, to await orders from the owner for its transportation. And where the company are prohibited by their charter from charging as warehousemen for storage, they can be liable as gratuitous bailees only, for property so deposited.² So *roadside deposits*, made to save the trouble of hauling to a regular depot, are at the risk of the owners, until they are put on a freight car. And an action cannot be maintained against a railroad, as a common carrier, for the loss or destruction of goods thus deposited, at a place where there was no regular station and no agent, although a conductor of a freight train had promised to stop and take them.³ And a distinction is to be observed, between a delivery to a common carrier, and a delivery to a party who receives the goods in some other capacity for transportation. Thus where goods were shipped from New York to Charleston, for the plaintiffs, doing business in Columbia, South Carolina, to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed : held, the company were not liable as common carriers, until the goods were received by them for carriage ; that, as *forwarding agents*, their liability was not that of common carriers ; but they would be liable for refusing to receive, unless they showed a good excuse ; and, after receiving, for not taking all the care which a prudent man would take about his own business.⁴ (a)

¹ Ford v. Mitchell, 21 Ind. 54.

² Michigan, &c. v. Shurtz, 7 Mich. 515.

³ Wells v. Wilmington, &c., 6 Jones,

⁴ Maybin v. Railroad Co., 8 Rich.

240. See Reed v. Spaulding, 5 Bosw.

395 ; Hutchings v. Ladd, 16 Mich. 493.

47.

(a) In case against a railway company, for negligence in carrying goods delivered to them as common carriers, whereby the plaintiff lost a market for them, the first plea traversed the delivery to, and acceptance of, the goods by the defendants, to be carried by them as common carriers ; and other pleas averred that the goods were delivered on special conditions. It appeared, that the plaintiff delivered a quantity of cheese at a station of the defendants' railway, to be carried to B for the purpose of being sold at a certain market, and signed a note containing the condition, among others, that the company should not be

liable for loss of market or other delay arising from detention. Held, that the judge at the trial was right in nonsuiting the plaintiff, on the ground that the defendants had not received the cheese to be carried by them as common carriers. *White v. The Great Western, &c.*, 40 Eng. L. & Eq. 255.

The owners of a freight and transportation line of steamboats, which forms part of a continuous line between distant places, but which is independent of other parts of the line, are liable, as common carriers, to the extent of their part of the line, and thenceforth as forwarders. They should forward goods at the earliest pe-

§ 11. As a general rule, a common carrier must *deliver* the goods to the owner or consignee, personally, at the place where the transportation ends, or offer to deliver them, or give notice of their arrival, unless in case of a special contract or an opposite usage, if even such usage would vary the liability.¹ More especially, if it be the general course of his trade so to do.² (a)

¹ *Schröder v. Hudson, &c.*, 5 Duer, 55; *Ten Eyck v. Harris*, 47 Ill. 268; *Finn v. Western*, 102 Mass. 283; *Fenner v. Buffalo*, 44 N. Y. 505; *Gilson v. Madden*, 1 Lans. 172; *Huntley v. Dows*, 55 Barb. 310; *Kremer v. Southern*, 6 Cold. 356; 2 Hilt. 150; *American, &c. v. Baldwin*, 26 Ill. 504. See *Price v. Powell*, 3

Comst. 322; *M'Henry v. Philadelphia, &c.*, 4 Harring. 448; *Russell v. Livingston*, 16 N. Y. 515; 23 Ill. 197; *Hilliard v. Wilmington, &c.*, 6 Jones, 343; *Gilkinson v. Steamboat*, 14 La. Ann. 417; *Sleade v. Payne*, Ib. 453; *American v. Hockett*, 30 Ind. 250.

² *Golden v. Manning*, 2 W. Bl. 916.

riod and by the most accustomed and safe mode of conveyance, unless otherwise directed, in which case they must follow the direction. *Ingalls v. Brooks*, 1 Edm. (N. Y.) Sel. Cas. 104.

(a) A carrier by water is bound to notify the consignee that the goods have arrived. *Shenk v. Philadelphia*, 60 Penn. 109.

Delivery on the wharf at the proper time, with notice, is sufficient. *Redmond v. Liverpool*, 56 Barb. 320. See *Goodwin v. Baltimore*, 58 Barb. 195.

The liability of railroads as common carriers continues until the goods are ready for delivery, and the consignee has had reasonable opportunity to remove them. Railroads are not bound to give notice of the arrival of, or to deliver goods, in order to discharge themselves as carriers. In determining whether a consignee had reasonable opportunity to remove the goods, the fact, that the goods did not arrive on time, and when the consignee expected them, is to be considered. *Jeffersonville v. Cleveland*, 2 Bush, 468.

Where the consignee resides at a place to which there is no regular carrier; the carrier is bound only to deliver them to a warehouseman at the point on his route nearest to such place, and to notify the consignee of such delivery. *Salinger v. Simmons*, 8 Abb. Pr. N. S. 409.

The unlawful interference of a revenue officer with the landing is no excuse for not landing and storing goods. Nor a local usage, unless fully proved. *Rowland v. Miln*, 2 Hilt. 150.

The goods may be delivered to custom-house officers, the duties not being paid. *Redmond v. Liverpool*, 56 Barb. 320.

The carrier is discharged, if the consignor takes possession before the goods reach their destination. *Cleveland v. Sargent*, 19 Ohio St. 438.

Whether delivery of part of the goods was understood and intended as a delivery of the whole, is a question for the jury. *Sessions v. Western*, 82 Mass. 132.

Carriers by railroads or steamboats engaged in the internal coasting and river trade, in the absence of a special contract, must deliver freight to the owner, consignee, or some authorized agent, or safely land it upon the wharf at the place of destination, or deposit it in their depot houses, and promptly notify the consignee. If delivered to a drayman, carman, or any other person not authorized by the consignee to receive it, it is at the risk of the carrier. The usage or custom of a port cannot dispense with delivery, or notice of the landing of the goods; nor will the fact, that the consignee and others have submitted to a delivery of goods to a drayman, before, when no loss occurred, bind him to yield his legal right to notice when it is for his interest to assert it. *Dean v. Vaccaro*, 2 Head, 488; 6 Bosw. 235.

If the plaintiff alleges that the article sent was not delivered, he must prove the allegation; but slight evidence will change the burden of proof. *Woodbury v. Frink*, 14 Ill. 279.

Where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be *non-delivery within a reasonable time*. And when the declaration alleges a contract to carry for hire, and the defendant's duty to be, to carry safely and deliver; and, as the breach, that a reasonable time for the delivery has elapsed, but the defendants have not delivered the goods: the plaintiff may recover, upon proof of non-delivery within a reasonable time. *Raphael v. Pickford*, 5 Man. & Gr. 551.

The carrier is bound to deliver precisely as he agrees, notwithstanding unforeseen circumstances which create a dif-

In pursuance of the contract in the bill of lading, carriers must show a delivery in good order, (a) and something more than

scutty in so doing. Thus the defendant, a common carrier, received from the plaintiff a package of money, to convey from S. to P., and deliver at the bank in P. When he arrived at P., the bank was shut. He went twice to the house of the cashier, and, not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it. The defendant then refused to be further responsible for any loss or accident. Held, not a legal excuse for non-performance of the undertaking. *Merwin v. Butler*, 17 Conn. 138.

The time of delivery is a reasonable time. *Nettles v. Railroad Co.*, 7 Rich. 190. See p. 560; *Place v. Union, &c.*, 2 Hilt. 19.

When, by reason of inexcusable delay, a common carrier fails to deliver goods until after they have diminished in market value, he is liable for the amount of the diminution, which is the difference between the market value of the goods when they were delivered and when they should have been delivered, at the place of delivery. *Cutting v. Grand*, 13 Allen, 381.

If a carrier is delayed a whole season by stress of weather, he is still responsible for the safe-keeping of the goods, as a carrier, and not as a mere warehouseman. *Western, &c. v. Newhall*, 24 Ill. 466.

A year is an unreasonable time for a carrier to take to convey a package from Boston to Milwaukee, and upon the expiration of that time the owner may well maintain an action for non-delivery. *Nudd v. Wells*, 11 Wis. 407.

After the accrual of such a right of action, a delivery to a connecting carrier, to forward, is not good, though it would have been if made in due season; and the second carrier cannot waive the owner's right of action by an acceptance for him without an express authority. *Ibid.*

But a demand by the plaintiff for the goods is a waiver of the non-delivery to the time of the demand, though not a waiver of damages for the delay; therefore if the defendant had delivered them to a connecting carrier as above, before that demand, the delivery is good, and he is only liable for the delay, and not as for a non-delivery (or conversion). *Ibid.*

If there has been delay in delivering, and if the price of the goods is the same

when they are delivered as when they ought to have been delivered, the damages for delay will be the interest on the value of the goods for the period between these times. *Smith v. Whitman*, 13 Mis. 352.

The rule of law, that common carriers are bound as *insurers* for the safe delivery of goods, does not extend to the time of delivery. *Boner v. Merchants, &c.*, 1 Jones, 211.

(a) With reference to the party to whom delivery shall be made; the plaintiff delivered to expressmen, running to Sacramento, a bag of gold dust, directed to the United States mint at San Francisco; they gave it to other expressmen, — *W. & Co.*, — running from Sacramento to San Francisco; and the latter delivered it at the mint. The agent, in San Francisco, of *W. & Co.*, afterward received the coin from the mint, signing the receipt, "*W. & Co. for P. T.*" (plaintiff), and delivered it to the first-named expressmen, marking it with their name, "for acc't of P. T." No instructions appeared to have been given by the plaintiff to either express company. The coin was never delivered to the plaintiff. Held, neither of them had any authority to receive the money, and the agent of *W. & Co.*, acting knowingly beyond the scope of his authority, was personally liable to the plaintiff for the value of the coin. *Tuite v. Wakelee*, 19 Cal. 692.

A railroad company have the right to demand a receipt for goods carried by them before they will be bound to deliver the goods, and the consignee has the right to an opportunity to examine the condition of the goods before signing the receipt. *Skinner v. Chicago, &c.*, 12 Iowa, 191.

When a railroad company have freight in their warehouse ready for delivery, they are not bound to take receipts for it, part by part as it is taken away, but may require a receipt for the whole before delivering any. *Morris, &c. v. Ayres*, 5 Dutch. 393.

Receiving the goods without objection, and receipting for them as in good order, is only presumptive evidence that they have not been damaged in the carrier's hands; as where cigars, unopened on receipt, were found wet. *Bloomington v. Durell*, 1 Idaho Terr. 21.

In regard to delivery, a carrier may presume, in the absence of some notice to the contrary, that the consignee is the

putting goods on shore or on a wharf. There must be notice to the consignee (*a*) or some excuse for not giving it, and a rea-

owner of the goods. *Sweet v. Barney*, 23 N. Y. (9 Smith) 335.

The plaintiff shipped tubs of butter by the defendant's boat, and directed the captain to sell them on arrival; on arrival, the captain hauled the boat to the pier, and gave her in charge to another agent of the carrier; the next day the butter was placed on deck, the captain sold part, and the rest was stolen. Held, that from the time the butter was placed on deck, it was to be deemed delivered to the captain as the shipper's consignee, and that the defendant's liability thereupon became that of a warehouseman. *Labar v. Taber*, 35 Barb. 305.

(*a*) It is held, that the carrier of goods by railway is not bound to seek out the consignee and offer to deliver them. It is the business of the consignee to repair to the depot to receive the goods, and, if the carrier refuse to deliver them without valid excuse, an action will lie. The fact, that some of the goods have been damaged in their transit, does not authorize the consignee to reject the goods entirely, and hold the carrier liable as for a total loss; neither does it devolve on the carrier any obligation to make an offer to deliver, otherwise than as if the goods had arrived uninjured. *Michigan, &c. v. Bivens*, 13 Ind. 263.

It is as much a part of the contract, that the owner or consignee shall be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter, as that the carrier shall transport and deliver them. *Alabama, &c. v. Kidd*, 35 Ala. 209.

But if the carrier undertake to deliver to his own agent, instead of the owner, he becomes liable as a warehouseman, after the arrival of the goods, and a warehouseman with whom he stores them is his and not the owner's agent, and the carrier is liable if the goods are thence delivered to an unauthorized person. *Ibid*.

A carrier may be relieved from his obligation to deliver goods at one place, by the consent of the consignee to receive them at another; but not by an offer to receive them on certain conditions, which was refused. *Arbuckle v. Thompson*, 37 Penn. 170.

A delivery to the wrong person, obtained by fraud, and without proper care of the carrier, renders him liable for the goods. *Winslow v. Vermont*, 42 Vt. 700. See *M'Ewer v. Jeffersonville*, 33 Ind. 368.

So where delivery was refused in con-

sequence of a wrong direction on the way-bill by the station agent. *Meyer v. Chicago*, 24 Wis. 566. See *Finn v. Clark*, 12 Allen, 522.

So a railroad is liable for goods delivered to the consignee as the property of another consignor, through a mistake of one of its clerks in making out the way-bill. *Chicago v. Ames*, 40 Ill. 249.

Delivery according to the address is sufficient. *Price v. Oswego*, 58 Barb. 599.

And a common carrier, in an action against him, may set up the right of the true owner against the skipper where the property has been delivered to the owner, whether voluntarily, or by process in a suit. *Bliven v. Hudson*, 36 N. Y. 403.

The plaintiffs bought fifty barrels of flour which were on deposit, in the freight depot of a railroad, taking from the vendor an order upon the company for their delivery, and presented it at the depot. The clerk, in accordance with the usual practice, took the order, delivering a "flour check" in return, which was duly delivered by the plaintiffs to another clerk, authorized to deliver flour upon such checks, and take receipts on the backs of the checks, for the amounts delivered from time to time, until the checks were filled. Upon this check twenty-two barrels were delivered to the plaintiffs, and twenty-eight to persons not authorized to receive them. Held, the defendants were liable for the value of the twenty-eight barrels, irrespective of negligence. *Hall v. Boston*, 14 Allen, 439.

The plaintiffs sold goods to A, upon condition that he should give a note therefor, signed by himself and B, and guaranteed by B; the goods to be sent to B, to be delivered by him to A upon the making and delivery to the plaintiffs of the note. The goods were delivered by the plaintiffs to the defendants, common carriers, marked for delivery to B, and were delivered to A, who thereupon forged and sent to the plaintiffs the required note, notifying them at the same time that he had received the goods, and pointing out certain mistakes in the charges. The plaintiffs acknowledged the notice, and made the desired corrections. They subsequently discovered the forgery, and sued A upon the note, and one of the plaintiffs testified that the note was given "for goods sold and delivered." There was further evidence tending to show that B had sanctioned the delivery to A. Held, the delivery by the defend-

sonable time given (a) to attend and receive the goods.¹ Thus, on landing goods, carriers by coasting vessels must give notice to the owner or to the consignee; and, if either refuses to receive

¹ *Scholes v. Ackerland*, 15 Ill. 474; *Graves v. Hartford*, Am. Law Reg., Jan. Barclay v. Clyde, 2 E. D. Smith, 95; 1873, p. 23.

ants was sufficient. *Platt v. Wells*, 2 Rob. (N. Y.) 101.

In the transportation of merchandise from one port of the United States to another, the fact that, under the custom of the latter, a landing and personal notice thereof may be a substitute for actual delivery, will not justify the carrier in abandoning the goods, or delivering them to a stranger; at least, until after the consignee has been allowed a reasonable time to remove them, even though such custom has been so long acquiesced in as to be presumed to form part of the contract. *Atlantic v. Johnson*, 4 Rob. (N. Y.) 474.

(a) The consignee of flour sent by rail demanded the flour at the freight depot the morning after its arrival, which was late in the afternoon, and it was not to be found. The railroad company was held liable. *Milwaukee, &c. v. Fairchild*, 6 Wis. 403.

The plaintiff occupied a room in the fourth story of a building, and the carrier brought a box, weighing about sixty pounds, and placed it within the outside door of the building at the foot of the stairs, and then went up and notified a boy whom he found in the office, that the box was there and must be taken care of. The boy was not authorized to receive packages. Held, not a delivery. *Haslam v. Adams, &c.*, 6 Bosw. 235.

As between a consignee (a bank) and an express company in the habit of carrying their packages, it is competent for the carrier to prove, that, after banking-hours, the bank is closed only as to banking business, and not as to the reception of packages, but that the latter have habitually been received on the arrival of the trains after banking-hours. That fact being proved, a tender of the package to the bank an hour and a half after banking-hours, at half past five o'clock, p. m., in summer, is a good and reasonable tender; after which the carrier is liable at most only for gross negligence. *Marshall v. Wells*, 7 Wis. 1.

A ship was ready to discharge, and, the consignees being notified, she began to discharge on Monday; the consignees took the freight away up to Wednesday night, leaving then a few bales on the wharf; Thursday was the annual "fast day" appointed by the governor. Dur-

ing the forenoon of that day more cargo was unloaded, and on the afternoon all that was on the wharf was burnt. Held, there was a good delivery to discharge the carrier from all liability. That, although the consignee might refrain from labor on that day, he did it at his own risk, and could not compel the carrier to refrain from delivering the goods, as there was no law of Massachusetts forbidding labor on that day, no custom engrafted into the maritime law, forbidding the tender of a cargo to a consignee on a church festival, fast, or holiday; and no special custom in the port of Boston compelling the carrier to observe "fast" as a holiday. *Richardson v. Goddard*, 23 How. 28.

In case of non-payment of freight, the goods being sent back too soon, the railroad was held liable. *Great, &c. v. Crouch*, 3 H. & N. 183.

With reference to the general question of time (see p. 558); a carrier is bound to proceed with due diligence and usual despatch, and the *onus* is on him to excuse his delay. (See Am. Law Rev. vol. viii. No. 3, Apr. 1874, p. 625.) Where the owner of cattle to be transported makes his own selection from the vehicles of the carrier, under circumstances charging him with knowledge of their capabilities and defects, the carrier is not responsible for any injury which results exclusively from those defects. But as the owner may assume that there will be no improper detention, the carrier will be responsible, if damage result from cars ill adapted to the purpose, in case of detention. As to defects not plainly apparent or visible, the burden is on the company, to show that the plaintiff had knowledge of them. As a train is in the charge and control of the company's agents, the company is responsible, if their refusal to allow cattle to be taken out and watered during a detention result in damage, although the owner's drovers accompany the cattle. *Harris v. Northern, &c.*, 20 N. Y. (6 Smith) 232.

The carrier is excused for delay by misdirection. *Finn v. Western*, 102 Mass. 283; *Congar v. Chicago*, 24 Wis. 157.

Where a case of merchandise was marked only upon the covering, and the covering torn off, thereby occasioning great delay; held, this was a proper

them, the carrier must safely secure them.¹ (a) So if common carriers from A to B charge and receive, for cartage of goods, to the consignee's house at B, from a warehouse there, where they usually unload, but which does not belong to them; they must answer for the goods, if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance be known to the consignee.² So it is held, that, when a railroad company carry goods on freight, it is their duty to give to owners and consignees actual notice of the arrival of the goods, or to show such a usage to the contrary, as warrants the presumption that contracts were made in reference to it;³ and that their liability as carriers continues, until the consignee has had a reasonable time to remove the property.⁴ (b) So a railroad

¹ Crawford v. Clark, 15 Ill. 561.

² Hyde v. Trent, &c., 5 T. R. 389. See Boston, 1 Low. 464.

³ Rome, &c. v. Sullivan, 14 Geo. 277; 2 Mich. 538.

⁴ Michigan, &c. v. Ward, 2 Mich. 538.

method of marking, and the carrier was chargeable by negligence for a failure to deliver. The City of Dublin, 1 Benedict, D. C. 46.

In case of delay in forwarding, a loss by fire falls on the carrier. Lawrence v. Winona, 15 Minn. 390. See Illinois v. McClellan, 54 Ill. 58; Scott v. Boston, 106 Mass. 468.

(a) Where a box of goods is carried to the place of destination, and there tendered to the consignee, who refuses to receive it, the carrier's liability is discharged by placing the box upon storage with a responsible warehouseman, who thereby becomes a bailee or agent of the owner. It is doubted whether in ordinary cases notice must not be given of such deposit; but this is unnecessary where the owner has not informed the carrier of his name and residence. Williams v. Holland, 22 How. (N. Y.) 137.

Goods belonging to the plaintiffs were received by the defendants, at the city of New York, on the 14th and 15th days of August, 1848, to be carried to Albany, and there delivered to A, the agent, at Albany, of the Rochester line of canal-boats. The goods were put on board a barge of the defendants, at New York, and taken to Albany, where they arrived on the morning of the 17th, and were destroyed by fire on that day, while in the possession of the defendants. A portion of them had been unloaded from the barge, and put into a float, in the Albany basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought

up the river, with different apartments for the different transportation lines West. It had been there for several years, and the custom was, to discharge goods brought up the rivers into it, from which the goods were reshipped into canal-boats, to be taken West, the canal-boats coming alongside, and receiving them. Held, that the defendants, having contracted to deliver the goods, &c., at Albany, continued to hold the relation of common carriers, until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver; that the defendants were not warehousemen at the time the goods were burned; that they had no right to warehouse them, unless in case of the absence of the person authorized to receive them, or of his neglect or refusal, after reasonable notice; and that the loss was not the result of inevitable accident, or the act of Providence. Miller v. Steam Navigation Co., 13 Barb. 361; acc. Steamboat Sultana v. Chapman, 5 Wis. 454.

(b) A provision in the charter of a railroad company, that, after certain notice to a consignee of the receipt of property, storage may be charged, and that in all cases the company shall be responsible for goods in deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers, does not exonerate the company from liability as carriers, where such notice has not been given. The language, "awaiting delivery," applies to the goods only after notice. 2 Mich. 538.

company can make a valid contract for the transportation of freight beyond their own road as fixed by the charter.¹ (a) And they are

¹ *Schröder v. Hudson, &c.*, 5 Duer, 55. See *Illinois, &c. v. Copeland*, 24 Ill. 332; *Rome, &c. v. Sullivan*, 25 Geo. 228; *Coxon v. Great, &c.*, 5 H. & N. 274; *Wing v.*

N. Y. &c., 1 Hilt. 235; *Bristol, &c. v. Collins*, 5 H. & N. 969; *Mytton v. Midland, &c.*, 4 Hurl. & N. 615; p. 319.

(a) It is held, that a railroad company may be bound, by a special contract (but not otherwise), to transport persons or property beyond the line of their own road. A company may be thus bound, without any actual arrangement with connecting lines, if, by their agents, they hold themselves out to be common carriers to a place beyond the limits of their own road. *Perkins v. Portland, &c.*, 47 Me. 573. See *Nashua v. Worcester*, 48 N. H. 339.

The presumption is held to be in favor of liability for the whole route. Public policy is against a division of responsibility. *Ladue v. Griffith*, 25 N. Y. (11 Smith) 364; *Brown v. Mott*, 22 Ohio St. 149; *Little v. Washburn*, Ib. 324.

A common carrier is liable for the loss of goods delivered to him, as such, at New York to be carried to Albany, and by him carried up the river, where a portion of them were transferred to a float, belonging to such carrier, preparatory to their delivery, and were there destroyed by fire. *Miller v. Steam, &c.*, 10 N. Y. (6 Seld.) 431.

Goods had been discharged from the barge of a North River carrier to his float in the Albany basin, and notice repeatedly given to the forwarders to whom they were directed to take them, when they were destroyed by fire. Held, the transfer to the float was not a delivery, but merely preparatory to delivery, and that by the delays the carrier did not become a depositary, but was responsible for the loss. *Gould v. Chapin*, 20 N. Y. (6 Smith) 259.

Under the (New York) act of 1847, c. 270, a railroad company, receiving goods under an agreement for transportation to a point beyond the terminus of its own road, and upon the line of a connecting road, whether within or without the State, is responsible as a common carrier for these goods, both upon its own line and upon the line of the connecting road. *Burtis v. Buffalo, &c.*, 24 N. Y. (10 Smith) 269.

And such contract is a valid one, independently of the statute. Ib.

Several parties, associated for the transportation of freight from Louisville to New York, charging through freight,

and giving through receipts, are liable as common carriers in case of loss of the goods between the two points; and the value of the goods at the point to which they were to be carried at the time they should have arrived, less the entire through freight, is the measure of damages. *Cincinnati v. Spratt*, 2 Duv. 4.

Where common carriers from Newark to New York agreed to carry a load of iron beyond the latter city to Saugerties, and redeliver it to the plaintiffs there; held, they were common carriers for the whole distance. *Tuckerman v. Stephens*, 3 Vroom, 320.

Where A undertakes to carry goods to a point beyond his own route, and delivers them to B, another carrier, to be forwarded to their final destination, and the goods are lost; the right of action is against A. *Southern v. Shea*, 38 Geo. 519.

When a carrier receives goods to be transported to a certain point of destination expressed upon the face of his receipt therefor, he undertakes to deliver them either by his own line or by his own competent agents, although his line stop short of the place of destination, especially when the extent of his line was not known to the shipper or communicated to him at the time of receiving the goods. *Mosher v. Southern*, 38 Geo. 37; *Southern v. Shea*, Ib. 519.

Where a railroad has no interest in a contract for through transportation, made between other parties, they cannot prevent the consignee from stopping the goods before reaching their line of road. If they carry them over their line in spite of the consignee's objections, they have no right to collect any freight or expenses. While goods are *in transitu* over a through line, they cannot, without the carrier's consent, or the payment of freight for the whole distance, be stopped by the consignee short of the destination fixed by contract; but the benefits of the contract will be confined to such carriers as were interested in it when made. *Withers v. Macon*, 35 Geo. 273.

Where goods are shipped, to be forwarded by a particular line, which is made up of several connecting lines, the liability of each carrier is limited to his

liable, though no demand be made at the point of termination, if the goods never reached the point in question, and they had no office there, nor any agent on whom the demand could be made.¹ So, although the agent, who contracted for their transportation, had no authority to receive goods of that description for the point in question, or to make any special contract; if he was their general agent in making contracts for the reception and transportation of freight, and the plaintiff had no knowledge or notice of any limitation of his powers.² So the contract of a common carrier, who receives goods addressed to a person beyond the terminus of his route, without limiting his liability, is to deliver them, in the same condition in which they were received, to the consignee; nor is the consignor compelled to inquire, how many corporations make up the entire route, nor, having ascertained this, to determine at his peril which of these corporations has been guilty of the negligence which caused the injury.³ But the owner of goods, by waiving any of his rights touching the delivery, so far relieves the carrier from his liability.⁴ Thus, if the owner sends a servant to meet the goods, who takes charge of them, the carrier's responsibility is at an end.⁵ So, in an action against an

¹ *Schröder v. Hudson, &c.*, 5 Duer, 55.

² *Ibid.*

³ *Foy v. Troy, &c.*, 24 Barb. 382.

⁴ *Stone v. Waitt*, 31 Me. 409.

⁵ *East India Co. v. Pullen*, 2 Stra. 690.

own possession of the goods. *Jacobs v. Hooker*, 1 Edm. Sel. Cas. 472.

A bill of lading stipulated to deliver goods "at Toledo for Detroit," and against certain liabilities as carriers. Charges were made for the whole route. Held, the first carrier was liable only for transportation over his own line, and delivery to the second. *McMillan v. Michigan*, 16 Mich. 79.

The second carrier is not exempted from his liability as such by the first carrier's agreements, in the absence of authority to the first carrier. *Ibid.*

The plaintiff delivered to P., at Worcester, a package addressed to him to be carried from Worcester to Chester. P. (who acted as agent for receiving goods both of the Great Western Railway Company and London and North Western Railway Company) wrote under the address, "via Stafford," and delivered the package to the Great Western Railway Company, who carried it on their line to Stafford, from whence it was carried in the defendants' wagons on the line of the London and Great Western Railway to Chester. Held, that there was evidence

of a contract with the Great Western Railway Company to carry the whole distance from Worcester to Chester, and therefore they were liable for damage to the contents of the package during the journey. *Webber v. Great*, 3 Hurl. & Colt. 771.

If one express company receives the money of a third party, without any contract to deliver it, from another; the former will still be liable for money had and received, if it does not deliver the money. *Southern v. Thornton*, 41 Miss. 216.

If one express company assumes all the liabilities of another, it will be liable for not delivering money under a contract with the latter company. *Ibid.* See, further, *Ætna v. Wheeler*, 5 Lans. 480; *Condict v. Grand*, 4 Lans. 106; *Wood v. Milwaukee*, 27 Wis. 541; *Barter v. Wheeler*, 49 N. H. 9; *Parmelee v. Western*, 26 Wis. 439; *Maghee v. Camden*, 45 N. Y. 514; *Reed v. U. S.*, 48 N. Y. 462; *Babcock v. Lake*, 43 How. Pr. 317; *Mills v. Michigan*, 45 N. Y. 622; *Pember-ton v. N. Y.*, 104 Mass. 144; *Hooper v. Chicago*, 27 Wis. 81; *Ricketts v. Baltimore*, 4 Lans. 446.

express company, it appeared that money was delivered to the company, marked for the plaintiff's corresponding bank in New York. The money had been carried to New York, and, on its arrival at the defendant's office there, a person in the employ of the bank called for it, and it was delivered to him, he receipting for it in the book of the company. He had received and receipted, in the same way, for every package directed to the bank, and carried by the company, for that month; and, during the last six months, he had received more than half the packages for the bank; and this mode of delivery to him was adopted, at the request of the bank officers, and was for the accommodation of the bank, and not the express company; and packages so delivered had been regularly credited by the bank, and no exception taken. On his way from the office to the bank, the messenger was robbed of the package, and this action was brought to recover the amount of the money contained in it. Held, the above facts were a good defence.¹

§ 12. When common carriers have carried goods to their destination, and given notice to the consignees of their arrival, if the goods are not called for within a reasonable time, their strict liability as carriers ceases, and they retain possession as mere bailees in deposit.² And the doctrine, somewhat conflicting with that already stated, has been laid down, that a railroad company, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable as depositaries only for want of ordinary care.³ (a) The company

¹ Sweet v. Barney, 24 Barb. 533.

² Rome, &c. v. Sullivan, 14 Geo. 277. See New Orleans v. Tyson, 46 Miss. 729; Weed v. Barney, 45 N. Y. 344; Ward v. New York, 47 N. Y. 29; Redmond v. Liverpool, 46 N. Y. 578.

³ Thomas v. Boston, &c., 10 Met. 472. See Salinger v. Simmons, 2 Lans. 325;

Hirsch v. Quaker, 2 Disn. 144; Fenner v. Buffalo, 44 N. Y. 505; Cook v. Erie, 58 Barb. 312; Rowe v. Pickford, 1 Moo. 526; Allan v. Gripper, 2 Cr. & Jerv. 218; Teall v. Sears, 9 Barb. 317; Jackson v. Sacramento, &c., 23 Cal. 268; Morris, &c. v. Ayres, 5 Dutch. 393.

(a) *A fortiori*, after refusal to receive the goods. Hathorn v. Ely, 28 N. Y. (1 Tiff.) 178.

Warehousemen are bound to exercise ordinary care and diligence. Titsworth v. Winnegar, 61 Barb. 148. See p. 530.

Non-delivery is *prima facie* proof of negligence. Schwerin v. McKie, 5 Rob. 404. See Cass v. Boston, 14 Allen, 448.

In an action against a railroad for

goods stolen while in their charge as warehousemen, it is held that they may prove that the same care was exercised with relation to the goods, which was usually exercised in the same city by other railroads in relation to such property. 14 Allen, 448.

The owner of a United States bonded warehouse, established under the act of 1854, c. 30, is alone liable for goods com-

are bound to carry freight safely to the place of destination, and there to safely deposit it in their warehouse, and to store it without extra charge until the consignee has a reasonable opportunity to remove it.¹ So where goods were deposited on the platform, in the usual place, ready for delivery, and the consignee notified thereof, and he paid the freight; held, the liability of the railroad as carriers was thereby at an end, and, even if the delivery and acceptance was not complete by the payment of freight and the lapse of a reasonable time for removal, yet the liability of the railroad was thereafter only that of warehousemen, and, as the goods were destroyed by fire without negligence on the part of the company, the owner must bear the loss.² So after the goods are safely deposited in the storehouse, the company will be liable only as warehousemen, and only responsible for ordinary neglect. And it is held that they are not bound to give notice of the arrival.³ So when a common carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger, upon the wharf, the transit is ended, and his responsibility as carrier ceases, unless he have, either expressly or by implication, undertaken to do something more; and the question, as to the time and place when and where the duty of the carrier ends, is one of contract, to be determined by the jury

¹ *Morris, &c. v. Ayres*, 5 Dutch. 393.

³ *Morris, &c. v. Ayres*, 5 Dutch. 393.

² *New Albany, &c. v. Campbell*, 12 Ind. 55.

mitted to his charge, and the United States officer in charge of the warehouse is not a necessary party to a suit brought by the owner to recover their value. *Schwerin v. McKie*, 5 Rob. 404.

A carrier of goods by canal, when near the place of delivery, presented to the warehouseman to whom the goods had been consigned, the bill of lading, informing him that the frozen condition of the canal prevented him from going further with his boat, and asking the warehouseman to pay the charges for freight. The warehouseman did so, giving a receipt on the shipping-bill for the goods, and the boat was left in charge of A. The warehouseman was afterwards paid by the owner for the charges on the property, and the advances made to the carrier for freight. The goods were damaged by water while remaining on the boat. Held, 1. That as soon as the warehouseman's charges and advances for freight had been paid by the owner, the latter was entitled to the possession and

control of the goods, and after that time such goods were not liable to any lien or claim of the warehouseman for storage or other charges, nor was he liable for any loss or damage which might happen to them. 2. That there was no consideration, either express or implied, for any contract by the warehouseman to take care of the goods. And it was not his duty to take care of the goods, there being no assumpsit to pay for such care, and no lien upon the property remaining in the possession of the carrier could exist in favor of the warehouseman. *Titsworth v. Winnegar*, 51 Barb. 148.

Barrels containing oil were carelessly handled by the employees of a carrier, and, while leaking, were delivered by them to another carrier in an adjoining warehouse, where by gross negligence the oil took fire, and both warehouses were consumed. Held, the first carrier was not liable for goods stored with him and destroyed by the fire. *McMillan v. Michigan*, 16 Mich. 79.

from a consideration of all that was said by either party, at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances.¹ So, in an action against a railroad corporation as common carriers, for the loss of goods directed to New York, a place situated beyond the terminus of such road; the declaration alleged, that the defendants were common carriers to New York. On the trial, it was admitted that the goods had been transported safely over the defendants' road, and deposited on board a steamboat for New York, where they were burnt. The plaintiff gave in evidence the defendants' charter, containing a permission thus to carry goods, also an advertisement, published in a newspaper, stating that freight would be billed by the defendants to New York, and evidence that the plaintiffs had been in the practice of sending freight to New York over the defendants' road from the time it went into operation, and that the defendants had made no demands of the plaintiffs for the freight of the goods, and then rested their cause. The defendants thereupon moved for a nonsuit, which was granted. Held, that such nonsuit ought not to be set aside.²

§ 12 *a*. But although the liability of an express company as common carriers may have ceased, they will nevertheless be liable if the goods are lost through the negligence of their agents. As where the property was locked up in a safe, and the key put in the coat-pocket of the expressman, which was left hanging near an open window of a room on the ground floor of a house in the city, where the expressman, who was a sound sleeper, slept; and the key was stolen, the safe opened, and the property stolen.³

§ 13. A carrier, who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies, (*a*) or the act, or fault of the

¹ *Farmers', &c. v. Champlain, &c.*, 23 Vt. 186.

² *Naugatuck, &c. v. Waterbury, &c.*, 24 Conn. 468. See *Lowell, &c. v. Sar-*

gent, 8 Allen, 189; *Johnson v. New York, &c.*, 31 Barb. 196.

³ *American, &c. v. Baldwin*, 26 Ill. 504. See *Great, &c. v. Rimell*, 6 C. B. N. S. 917.

(*a*) See *Wallace v. Sanders*, 42 Geo. 486; *Spaids v. New York*, 3 Daly, 139; *Lewis v. Ludwick*, 6 Cold. 368; *Patterson v. North Carolina*, 64 N. C. 147. The term *public enemy* applies to United States forces within the Confederate lines. *Southern v. Womack*, 1 Heisk. 256.

A railroad received goods, which were placed on cars, and, having gone a part

of the distance, the cars were detached from the train, and others taken up in their place, which train arrived safely. The cars left behind were taken on the train of the following day, and while on the way the train was captured and burnt by the public enemy. Held, the railroad was not liable. *Clark v. Pacific*, 39 Mis. 184.

owner; even though the jury find expressly that the goods were destroyed without any, even the slightest, actual negligence in the carrier. He is liable for inevitable accident, happening through the intervention of any human means.¹ (a) "It appears from all the cases for one hundred years back, that there are events, for which the carrier is liable, independent of his contract."² A carrier is in the nature of an *insurer*. The obligation of a common carrier does not arise out of *contract*, in the usual sense of that expression, but it is declared by law, and his responsibilities are fixed by considerations of public policy.³ (b) He is bound to guard against future, as well as to rescue from present, danger.⁴ Thus a hoyman, who undertakes to carry goods, must deliver them safe at all events, except damaged by the act of God, or by the king's enemies.⁵ Though a hoyman is not answerable for goods lost by the accidental oversetting of his hoy by the wind.⁶ (c)

§ 14. Unavoidable accidents, or acts of God, are any accidents produced by physical causes which are inevitable, such as lightning, storms, (d) perils of the sea, earthquakes, inundations, sud-

¹ *Forward v. Pittard*, 1 T. R. 27; *Central, &c. v. Hines*, 19 Geo. 203; *Pendall v. Rench*, 4 M'Lean, 259; *M'Henry v. Philadelphia, &c.*, 4 Harring. 448; *Laveroni v. Drury*, 16 Eng. L. & Eq. 510; *Powell v. Mills*, 30 Miss. 231; *Strohn v. Detroit*, 23 Wis. 126; *Southern v. Moon*, 39 Miss. 822; *Arnold v. Jones*, 26 Tex. 335; *Klauber v. American*, 21 Wis. 21; *Knowles v. Dabney*, 105 Mass. 437; *Goodwin v. Balti-*

more, 58 Barb. 195; *Butterworth v. Brownlow*, 19 C. B. N. S. 409.

² Per *Ld. Mansfield*, *Forward v. Pittard*, 1 T. R. 27.

³ *Thurman v. Wells*, 18 Barb. 500.

⁴ *Watts v. Saxon*, 11 La. Ann. 43; *Blocker v. Whittenburg*, 12 Ib. 410.

⁵ *Dale v. Hall*, 1 Wils. 281.

⁶ *Amies v. Stevens*, 1 Str. 127.

(a) The reason of this strict liability is thus expressed in the civil law: "Nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt exequendi cum ne nunc quidem abstineant hujusmodi fraudibus." Dig. 4, 9, lib. 1.

(b) *Home v. Oswego*, 56 Barb. 121; *Maggie*, 9 Wall. 435.

(c) The act of law would seem to furnish another excuse. A common carrier, from whom the goods are actually taken and kept by a valid process of law, is thereby excused from delivery. It is immaterial that the process was obtained by fraud, if the carrier is in no way privy thereto. As where the property was taken under a search-warrant, and was by the court ordered to be delivered to one who claimed that it had been stolen from him by the bailor. *Bliven v. Hudson, &c.*, 35 Barb. 188. See p. 573.

There is no difference in point of law between common carriers on land and

common carriers by water. *King v. Shepherd*, 3 Story, 349.

Nor, generally, as between a liability for goods, and animals. 4 Kern. 570; *Wilson v. Hamilton*, 4 Ohio, N. S. 722. But see pp. 314, 569, 570.

The principle, that, where both parties are equally to blame in causing an injury, neither can recover, does not apply to a case where goods are delivered to a carrier during the peril of a storm. It is for him to decide whether they can be safely received, and if he receives them he is liable from that time. *New Brunswick, &c. v. Tiers*, 4 Zabr. 697.

The cause of loss or damage is a question for the jury. *Hall v. Renfro*, 3 Met. (Ky.) 51.

(d) As in case of a severe snow-storm which obstructed the railroad and blocked up the trains. *Ballentine v. North*, 40 Mis. 491. See *Withers v. New Jersey*, 48 Barb. 455; *Swetland v. Boston*, 102 Mass. 276.

den death, or illness, &c.¹ (a) But the act of God, which would excuse a common carrier, must be the *immediate*, and not the *remote*, cause of the loss.² (b) It must be a *direct and violent act of nature*. Thus, where a boat upon a river is stranded upon a recently formed bar, of which the carrier was ignorant, he is liable.³ So, if it might not have happened but for the negligence of man, the carrier is liable. (c) Therefore, where a violent storm causes an unusually low tide, and the carrier's barge, lying at the pier, is pierced by a projecting timber, covered at ordinary tides, and not known by the carrier to exist; he is liable, notwithstanding his leaving the barge there would not have produced the injury, without the concurrence of the act of God, and the negligence of the wharf-builder.⁴ So where the injury was caused by contact of the steamboat with the mast of a sloop, sunk in a squall two days before, which mast was fifteen or sixteen feet out of water at low tide, and was visible the day before, and on that day.⁵ So a ship sailed from New Orleans for New York, on the 20th of June, with a cargo of tobacco in hogsheads, and lard in barrels, the hogsheads and barrels being badly stowed and coopered. When she was seventeen days out, not having met any very rough weather,

¹ Fish v. Chapman, 2 Kelly, 349; The Freedom, L. R. 3 C. P. 594; Price v. Hartshorn, 44 N. Y. 94.

² King v. Shepherd, 3 Story, 349; Oakley v. Port, &c., 34 Eng. L. & Eq. 530; M'Henry v. Philadelphia, &c., 4 Harring. 448.

³ Friend v. Woods, 6 Gratt. 189.

⁴ New Brunswick, &c. v. Tiers, 4 Zab. 697.

⁵ Merritt v. Earle, 29 N. Y. (2 Tiffa.) 115.

(a) A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts or incur extra expense, in order to surmount obstructions caused by the act of God; as a fall of snow. Briddon v. Great, &c., 4 Hurl. & Nor. 847.

(b) But on the other hand the carrier is not liable, if his own act is not the proximate, though in part the remote, cause of loss. Thus the defendants contracted to transport certain goods upon a canal. By reason of an extraordinary flood in a certain division of the canal, the boat was wrecked, and the goods greatly damaged. The boat started on its voyage with one lame horse, by reason whereof great delay was occasioned, but for which the boat would have passed the point where the accident occurred before the flood came, and have arrived safely and in time at the point of destination. Held, that the use of the lame horse was

too remote a cause of the accident to render the defendants liable. Morrison v. Davis, 20 Penn. 171.

Where goods were placed on the main deck, between the hatches of a propeller, and were necessarily thrown overboard and lost in a tempest, by order of the master, for the preservation of the vessel, &c.; held, the owners of the vessel were not liable. Gillett v. Ellis, 11 Ill. 579.

In an action against a common carrier upon a bill of lading, for a failure to deliver cotton in good order, all the damage being caused by rains; a custom, known to the plaintiff, to transport cotton and other freight, between the points named in the bill of lading, in open boats, constitutes a good defence. Chevallier v. Patton, 10 Tex. 344.

(c) Common carriers are liable for the loss of goods intrusted to them, occasioned by their failure to transport them. Adams v. McDonald, 1 Bush, 32.

lard was pumped from her, and the tobacco was damaged by the lard running into it. Held, that this damage was occasioned by other causes than the perils of the sea, and that the ship was responsible for it.¹ So a carrier is responsible for injuries to perishable goods (potatoes) by cold, where due care in view of all the circumstances was not taken to protect them.² So for loss by reason of a defective car, though the defect was known to the plaintiff.³ So a general ship at New Orleans took 354 barrels of flour for Boston, and also 190 barrels of spirits of turpentine, the effluvia of which injured the flour. Held, the carrier was responsible. Though an established usage to carry those articles, as parts of the same cargo, on such a voyage, would have exonerated him.⁴ So a leak in the ship furnishes no excuse.⁵ So where, pursuant to a contract of affreightment, the master of a ship had taken part of the cargo into his custody at Mobile, and conveyed it a distance of several miles, in a steam lighter, to his ship, but it was destroyed by the bursting of the boiler, while alongside and before it was taken on board; held, that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor upon the ship.⁶ So, when transporting animals by railroad, the carrier is responsible for an injury not caused by an occurrence incident to such transportation, and which might be avoided by diligence and care.⁷ (a) So a railroad cannot set up as inevitable accident, that the cars were thrown from the track by accidentally running over a man; if he was a drover, attending to cattle on the train, and fell off for want of a suitable place for such persons, and because compelled to stand on the bumpers; although he fell by his own carelessness.⁸ But injury to goods shipped in the hold of a vessel, resulting from an intrinsic principle of decay inherent in the goods

¹ The Newark, 1 Blatch. C. C. 203.

² Wing v. New York, &c., 1 Hilt. 235.

See Wallace v. Clayton, 42 Geo. 443.

³ Pratt v. Ogdensburg, 102 Mass. 557.

⁴ Col. Ledyard, Sprague, 530.

⁵ Emma Johnson, Sprague, 527. See Tysen v. Moore, 56 Barb. 442.

⁶ Edwin, Sprague, 477; Caldwell v. New Jersey, 56 Barb. 425. See 18 Eng. L. & Eq. 346.

⁷ Clarke v. Rochester, &c., 4 Kern. 570.

⁸ Goldey v. Pennsylvania, &c., 30 Penn. 242.

(a) Contract by a railway to carry cattle, (1) "The owner undertakes all risks of loading, unloading, and carriage, whether arising from the default of the company's servants, or from defect in the station, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatever." (2) "The

company will grant free passes to persons having the care of cattle, as an inducement to the owners to send proper persons with them." Held, the first provision was unreasonable, and so void by 17 & 18 Vict. c. 81, § 7; and it was not made reasonable by the owner's taking advantage of the second. Rooth v. North, Law Rep. 2 Ex. 173.

themselves, or from the natural closeness and dampness of the hold, on a voyage delayed by boisterous weather and adverse winds, is not damage for which the carrier is responsible, who has undertaken, by a bill of lading in common form, to deliver the goods in like good order and condition, as shipped, "dangers and accidents of the seas and navigation of whatsoever nature and kind excepted;" unless he might have prevented the damage by usual and proper skill, precaution, and diligence, the burden of proving which is on the owner of the goods.¹ So in a case of shipment of lard from New Orleans, in summer, the casks were well coopered when loaded, and well stowed, but, upon arrival at New York, there had been a very great loss of weight. The lard was shipped in extraordinarily hot weather; and lard of this quality, in very hot weather, is apt to liquefy; in so doing it expands, which causes the hoops of the casks to slip and the casks to leak. On the arrival at New York, the hold of the vessel was excessively hot, and the hoops started on most of the casks, both those near the deck and those at the bottom. Held, the shipper must bear the loss.² So a vessel loaded with fruit, under a bill of lading exempting her from loss by liability to decay, was obliged to put into a port of distress, and, finding there no vessel by which to forward the cargo, made repairs with all the speed possible at that port, and meantime took such care of the cargo as the persons at that port most experienced in such cases advised. Held, the carriers were not responsible, for the loss of the fruit by decay; also, that, whether the best was done to take care of the cargo was immaterial, it appearing that the master acted to the best of his judgment, guided by advice which was the best he could procure, and which he had reason to believe could be relied on.³ And the same rule is applied, in transportation of animals, to any damage caused by the animal's own viciousness or by that of other animals on board with it at the time.⁴

§ 15. If a common carrier by water be prevented from delivering goods on account of the freezing up of the river, his obligation to deliver them in a reasonable time after the resumption of navigation will still continue.⁵ And it is the duty of a carrier, when

¹ *Clark v. Barnwell*, 12 How. (U. S.) 272; *Rich v. Lambert*, Ib. 347.

² *Nelson v. Woodruff*, 1 Black, 156. See *Place v. Union, &c.*, 2 Hilt. 19.

³ *Collenberg*, 1 Black, 170.

⁴ *Hall v. Renfro*, 3 Met. (Ky.) 51. See

Gill v. Manchester, 28 L. T. Rep. N. S. 587; *Am. Law Rev.*, vol. viii. No. 1, Oct. 1873, p. 180; *Pitre v. Offutt*, 21 La. Ann. 679; *Michigan v. M'Donough*, 21 Mich. 165; *Penn. v. Buffalo*, 3 Lans. 448.

⁵ *Lowe v. Moss*, 12 Ill. 477.

goods in his care are injured, to make reasonable exertions to repair the injury or arrest its progress. Hence, if packages of fur become wet, he should have them opened and dried.¹ Though the master of a steamboat carrying wheat, which was wet by inevitable accident, was held not liable for damages because he did not dry the wheat.² So a carrier is liable in case of loss by fire, even though originating in a building other than that where the goods are stored.³ As in case of an accidental fire or conflagration in a city.⁴ So, if common carriers receive goods with orders to "ship immediately," which are stored in their warehouse on account of the obstruction of navigation, and there consumed by fire, they are liable for their value.⁵ So the proprietor of a steamboat is liable for cotton carried by him, which is destroyed by fire on board his boat, unless he can show a well-known, recognized, and established usage, to exempt such carriers from such liability, except where a higher rate of freight is paid; or unless a general and well-understood notice to that effect has been given by this particular carrier, so as to constitute a part of the implied contract; and even in those cases the carrier should be held to strict proof of diligence and care.⁶ So a statute, limiting the responsibility of ship-owners for a loss occasioned by fire, does not extend to the case of a fire happening on board a lighter, employed in carrying goods from the shore to be loaded on board a ship.⁷ (a)

§ 16. A common carrier by water is liable for a loss caused to goods by unnecessary *delay and unseaworthiness* of the vessel; unless the loss would have happened without such delay and un-

¹ Chouteaux v. Leech, 18 Penn. 224.

² Steamboat Lynx v. King, 12 Mis. 272. And see Klauber v. American, 21 Wis. 21.

³ Forward v. Pittard, &c., 1 T. R. 27; Empire v. Wamsutta, 63 Penn. 14.

⁴ Miller v. Steam, &c., 10 N. Y. (6 Seld.) 431.

⁵ Clarke v. Needles, 25 Penn. 338.

⁶ Singleton v. Hilliard, 1 Strobbh. 203.

⁷ Morewood v. Pollok, 18 Eng. L. & Eq. 341. See Sprague, 477; The Bark, 1 Cliff. 322.

(a) On which party is the burden of proof, in case of a contract for exemption from liability for fire, see Berry v. Cooper, 28 Geo. 543; Patterson v. Clyde, 67 Penn. 500.

See also Pemberton v. N. Y., 104 Mass. 144; Barter v. Wheeler, 49 N. H. 9; Clyde v. Graver, 54 Penn. 251.

Though the owner assumes the risk of loss by fire, a railroad is responsible, in case of such loss, for negligence; and this notwithstanding a notification to the owner that the goods would be carried on an uncovered car. Montgomery v. Edmonds, 41 Ala. 667.

Otherwise, if no fault or negligence is shown. New Orleans v. New Orleans, 20 La. Ann. 302.

Bales of cotton were delivered to a railroad, and a receipt given, in the nature of a bill of lading, which had stamped upon it the words "at owner's risk of fire." The cotton was destroyed by fire in the course of its transit. Held, the burden of proof was on the company to show care, skill, and diligence on its part; and, if the loss was occasioned by its negligence, or by the car's not being close and tight, the company was liable. Levering v. Union, 42 Mis. 88.

seaworthiness.¹ And where a cargo consisted of salt and earthen and other wares, and the latter were injured, and no evidence appeared that there had been a stress of weather or great storms during the voyage, nor of the condition of the vessel before it sailed; held, it was incumbent on the carrier to show, that the injury had happened from a cause for which he was not liable; and, as a bad condition of the vessel had been developed, and no cause shown for it, it was a presumption of fact, though not of law, that the vessel was unseaworthy when she sailed.² But, in an action against a carrier, on a bill of lading, for a loss of freight, although his boat was not seaworthy, it is yet held competent for him to show, that the loss was in fact occasioned by the excepted perils of the river, and not by the unseaworthiness of the boat, and must have happened if that defect had not existed; though a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence, which might have had an agency in producing it, will render him liable.³ So to an action against one railroad corporation for non-delivery of cattle in reasonable time, it is a good defence, that the delay was caused by a collision wholly owing to the negligence of another corporation.⁴ (a)

§ 16 a. A common carrier is liable even for a loss by act of God,

¹ *Smith v. Whitman*, 18 Mis. 352; *Garena, &c. v. Rae*, 18 Ill. 488.

² *Cameron v. Rich*, 4 Strobh. 168.

³ *Collier v. Valentine*, 11 Mis. 299.

⁴ *Conger v. Hudson, &c.*, 6 Duer, 375.

(a) In reference to the liability of a common carrier, as affected by his contract; though the bill of lading be silent as to the matter, it is held that the law implies an exception as to losses occasioned by inevitable accident; but such implication may be repelled by parol proof, connected with advertisements and circulars, of an agreement to insure a safe delivery without any exception. *Morrison v. Davis*, 20 Penn. 171. See *Fleming v. Mills*, 5 Mich. 420; *Read v. Spaulding*, 30 N. Y. 630.

A common carrier contracting to forward goods "by sail on the lake," all lake dangers being in that case taken by the owners, is liable as insurer for their loss, if sent by steam. *Merrick v. Webster*, 3 Mich. 268.

A common carrier, who receipts for goods as being "in good order and well conditioned," where the goods are closely boxed, may, in an action by the shipper

for damage done to the goods, show by parol evidence that the goods were in fact damaged when they were shipped. *Gowdy v. Lyon*, 9 B. Monr. 112.

As to what constitutes positive negligence in a common carrier, it is held that the omission to provide bars for the open ends of a ferry-boat, frequently used in transporting horses, affects the carrier with liability, for neglect, in case of loss from that cause. *Wilson v. Hamilton*, 4 Ohio, N. S. 722.

But negligence in the management of a boat is not a conclusion of law from the circumstance that a difficult place was passed by the boat in the night. *Ready v. Steamboat, &c.*, 17 Mis. 461.

And the rule, which imputes carelessness to a captain, whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoid-

if himself in fault; as where the goods were wetted at the depot, by an extraordinary flood, caused by the obstructions of the water in a channel by ice, there having been unreasonable delay in forwarding them.¹ So though a vessel be lost by act of God, the carrier is bound to use due diligence in providing another.² (a) But proprietors of a railroad, who negligently delay the transportation of goods, and then transport them safely, are not responsible for injuries to the goods by a flood while in their depot, although the goods would not have been exposed to such injury but for the delay.³

§ 16 b. It is held that a carrier is exonerated, where the property is taken from him by legal process, provided the owner is promptly notified.⁴ But in a late case the carrier was held responsible, though the goods were attached as a stranger's.⁵ A carrier is not responsible where, before arrival, the goods were abandoned to the insurers.⁶

§ 17. In an action against a common carrier, it is sufficient to prove that the goods were received by the carrier, and that he has failed to deliver them, according to his undertaking.⁷ And if the carrier cannot show that the loss has accrued by one of the excepted perils, he is liable. Proof of negligence is unnecessary to charge him, and proof of diligence will not excuse him.⁸ Thus a box of sovereigns was shipped, to be carried for hire from New York to Mobile, and the bill of lading only contained the usual exceptions against perils of the seas. The vessel was wrecked on the "Honda Reefs," and the captain then removed the box from the state-room, where it could be locked up, and placed it in the run, where the crew had free access, and allowed it to remain there, without personally superintending it, while the wreckers were on board. The box was lost; and a libel was brought against the

¹ *Read v. Spaulding*, 30 N. Y. (3 Tiff. fa.) 630; 5 Bosw. 395. See *Beal v. South*, 3 Hurl. & Colt. 337; *Dunson v. N. Y.*, 3 Lans. 265.

² *Williams v. Vanderbilt*, 28 N. Y. (1 Tiffa.) 217; *Ib.* 29 Barb. 491.

³ *Denny v. New York, &c.*, 13 Gray, 481.

⁴ *Bliven v. Hudson*, 86 N. Y. 403. See p. 567.

⁵ *Edwards v. White*, 104 Mass. 159.

⁶ *Mohawk*, 8 Wall. 153.

⁷ *McCall v. Brock*, 5 Strobb. 119.

⁸ *Ibid.*

ed, and does not apply to the navigation of the Western rivers. There, each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. *Collier v. Valentine*, 11 Mis. 299.

(a) Carriers are bound to convey with reasonable expedition. It is no answer to an action against them for damages arising from delay, that they carried at their ordinary rate. *Blakemore v. Lan. &c.*, 1 F. & F. 76.

master and owners to recover its value. Held, the burden of proof was on the respondents to show, that the loss occurred by a peril of the seas; and, failing in this, they were responsible for the loss however it occurred.¹ But a railroad is not liable for the death of an employee killed in the ordinary course of his duty by an accident to his train, there being no evidence as to the cause of the accident except that a spring of the engine was found freshly fractured.² And the act of God discharges the carrier without his affirmatively disproving negligence.³

§ 18. A common carrier is sometimes held liable in *trover* for not delivering or losing goods.⁴ (a) Thus for a carrier to deviate from his established route is a misfeasance, and, if the goods be lost during the deviation, a conversion.⁵ And he is thus liable, although he has no beneficial interest, if he misuses a chattel intrusted to him, puts it into the hands of a third person without order, or by mistake, or on a forged order.⁶ So *trover* lies, for recovering goods of a carrier, which he has damaged, and detains for freight. And this without averring payment or tender of a reward for transportation and safe-keeping.⁷ So for delivery to the consignee after notice to an agent of the carrier in possession that the consignee had become insolvent.⁸ But the prevailing rule is, that *trover* will not lie against a common carrier (or a wharfinger) where the goods are stolen (b) or lost; but the remedy must be by an action on the case.⁹ Nor for goods lost by nonfeasance merely.¹⁰ (c) Nor for refusing, or omitting seasonably to deliver

¹ King v. Shepherd, 3 Story, 349.

² Hando v. London, L. R. 2 Q. B. 439, n.

³ Railroad v. Reeves, 10 Wall. 176; Lambert v. Benner, 1 Sweeny, 665.

⁴ Greenfield, &c. v. Leavitt, 17 Pick. 1; Jeffersonville v. White, 6 Bush, 251. See Northern v. Sellick, 52 Ill. 249.

⁵ Phillips v. Brigham, 26 Geo. 617.

⁶ Trowell v. Youmans, 5 Strobbh. 67.

⁷ Ewart v. Kerr, 1 Rice, 204.

⁸ Jones v. Earl, 37 Cal. 630.

⁹ Ross v. Johnson, 5 Burr. 2825.

¹⁰ Bowlin v. Nye, 10 Cush. 416.

(a) The plaintiff, having been imposed upon by a swindler, consigned a box, at Birmingham, by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but, upon receiving a letter signed J. West, requesting that the box might be forwarded to a public-house at St. Albans, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box. That person having disappeared, and the box having been originally obtained of the plaintiff by fraud;

held, the defendants were liable to him in *trover*. Also, that it was properly left to the jury to say, whether the defendants had delivered the box, according to the due course of their business as carriers. *Stephenson v. Hart*, 4 Bing. 476.

(b) A carrier's merely taking possession of stolen property is no conversion. *Koch v. Branch*, 44 Mis. 542.

(c) And instructions to a jury, that they might find a conversion, if the defendant so managed as to interfere with the rights of the plaintiff to, and control over, the property, so that the plain-

the goods, without a previous demand.¹ And in general it is held, that a demand is necessary, before trover will lie.² (a)

§ 19. It is a question much discussed, whether the common-law liability of a carrier may be restricted by *express notice*, relating to the conditions or the extent of such liability; either publicly advertised, or embodied in an express agreement with the party whose goods are transported. (b)

¹ Robinson v. Austin, 2 Gray, 564; M'Entee v. New Jersey, 45 N. Y. 34.

² Rome, &c. v. Sullivan, 14 Geo. 277.

tiff lost the same; were held too indefinite for application by the jury, and to have a tendency to mislead them. 10 Cush. 416.

(a) Case on the custom and trover cannot be joined. Dalston v. Janson, 1 Ld. Raym. 58.

The following distinctions are made upon this subject:—

Trover lies against a carrier for refusing to deliver goods given to him to carry; or an action on the case. But trover will not lie against him, for refusing to deliver goods given to his servant, unless he has been guilty of an actual conversion. Taylor v. —, 2 Ld. Raym. 792.

Trover does not lie against a carrier for negligence; as for losing a box, &c. But it lies for an actual wrong; as if he break it to take out goods, or sell it. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, it is good evidence of a conversion. 2 Salk. 655.

It is held that trover may be maintained against a common carrier, where the goods are lost by his *act*, though without any wrongful intent; as where he delivers them to the wrong person by mistake, or under a forged order. But if the goods are lost through the mere *omission* of the carrier, trover will not lie, even after demand and refusal; but only assumpsit or case. Hawkins v. Hoffman, 6 Hill, 586. See Taylor v. Monnot, 1 Abb. Pr. 325.

(b) In a late case, the question whether a consignee was liable for the price of goods sent, turned upon this point.

The plaintiffs in Ohio sent, by the defendant's order, goods by rail into Michigan, without special instruction. The defendant merely stated his preference for the particular railroad, as it would be liable for the risks. The plaintiffs accepted in good faith a bill of lading, con-

taining exemptions from liabilities, which had been customary for several years. The railroad did not accept goods for transportation otherwise, nor did it appear that they were under legal obligation to do so. The goods were destroyed by fire. In an action for their value, held, the plaintiffs were entitled to recover. Gordon v. Ward, 16 Mich. 360.

As to the distinction between a *contract* and mere *notice*, and more particularly with reference to *tickets*, see Nevins v. Bay State, &c., 4 Bosw. 225; Western, &c. v. Newhall, 24 Ill. 466. See, also, M'Andrew v. Electric, &c., 33 Eng. L. & Eq. 180; Hunt v. The Cleveland, 6 M'Lean, 76; Dorr v. N. J., &c., 4 Sandf. 136; Farmers', &c. v. Champlain, &c., 23 Vt. 186; Baxendale v. Hart, 9 Eng. L. & Eq. 505; Moore v. Evans, 14 Barb. 524; Moses v. Boston, &c., 32 N. H. 523; Newstadt v. Adams, 5 Duer, 43; Kimball v. Rutland, &c., 26 Vt. 247; Wilson v. Shulkin, 6 Jones, 375.

As to the statute of 17 & 18 Vict. c. 31, § 7, by which the court must adjudge whether a notice is *reasonable*, see M'Manus v. Lancashire, &c., 4 H. & N. 327.

The plaintiff signed a receipt note for fish, delivered to the defendant for transportation, which contained the following provisions: "Fish will be conveyed only by special agreement and by particular trains mentioned in the time-bills of the company; they will not be responsible for loss of market, or other loss, &c., arising from delay of the train, exposure to weather, stowage, or any other cause other than gross neglect or fraud." The time-tables mentioned the trains in which fish would be carried, "subject in all cases to the immediate convenience and arrangements of the company." These conditions were held to be *reasonable*, and the contract valid. Beal v. South, &c., 5 Hurl. & Nor. 875; *Ib.*, 3 Hurl. & Colt. 337.

A condition, that the carrier should

§ 20. It is held, that, where a carrier gives notice to his customers, that he will not be accountable for any parcel, &c., of more than a certain value, unless entered as such and paid for accordingly; if a parcel be sent above that value, without being entered and paid for as such, and it be lost, the owner is not entitled to recover anything. And this, without reference to the high price which he agrees to pay for the carriage of the article; and although the carrier does not prove that the loss happened by any of those accidents, against which the law makes him an insurer. Nor is the carrier bound to prove that he used reasonable care.¹ And the same rule is held to apply to other limitations of responsibility; whether relating to the nature of the property, the mode of transportation, or the time of delivery. (a) Nor will a mere

¹ *Izett v. Mountain*, 4 E. 371; *Harris v. Packwood*, 3 Taunt. 264; *Stoddard v. Long Island, &c.*, 5 Sandf. 180; *Marsh v. Horne*, 5 B. & C. 322; 2 J. P. Smith, 107;

Bignold v. Waterhouse, 1 M. & S. 255; *Peek v. North, &c.*, 1 Ell., Bl. & Ell. 958; *Ladue v. Griffith*, 25 N. Y. (11 Smith) 364.

not be liable unless a claim should be presented within thirty days after date of the receipt, was held unreasonable and void in a contract to carry a valise from Indiana to Georgia, dated Jan. 24, 1865. *Adams v. Reagan*, 29 Ind. 21.

A declaration, setting out merely an ordinary engagement of a common carrier, is not supported by proof of a contract, containing a special exception of the general liability. *Davidson v. Graham*, 2 Ohio, N. S. 131.

Circumstantial evidence is competent to prove, that a clause, by which the responsibility of the carrier was limited, was left in the bill of lading by mistake. The question of mistake is for the jury, and the burden of proof is on the party who alleged it. *Chouteaux v. Leech*, 18 Penn. 224.

Where a special contract was made between a common carrier and his employer, and a loss has occurred, the burden of proof rests on the carrier, to show that the loss occurred from one of the causes excepted. *Davidson v. Graham*, 2 Ohio, N. S. 131.

A bill of lading for cotton shipped by a steamboat carrier contained the following exception:—"dangers of fire and navigation only excepted." Another bill contained the following exception:—"unavoidable accidents of navigation and fire excepted." The cotton was burnt on board the boat. Held, that "dangers of fire," and "unavoidable accidents of fire," meant the same thing, and that the term "fire" meant any fire, and was not re-

stricted to fire originating from the furnace of the boat. *Swindler v. Hilliard*, 2 Rich. 286.

(a) *Adams v. Loeb*, 7 Bush, 499. A horse was delivered to a railway company at N., to be conveyed to W. for the plaintiff. The person who delivered the horse signed a contract, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage to horses thus conveyed. The horse reached the station at W. safely, but the company's servants there either forgot or did not notice that the horse had arrived, and, on the plaintiff's calling for it the next day, it was discovered in a horse-box on a siding, and found to have sustained serious injuries from cold, and from remaining in a confined position all night. Held, the company was protected from liability, under the 17 & 18 Vict. c. 31, § 7, by the signed contract. *Wise v. Great Western, &c.*, 36 Eng. L. & Eq. 574.

The plaintiff, who had cattle conveyed by railway, received for them a ticket, which he signed, containing the terms on which the company carried the cattle. At the foot of the ticket was a clause: "N. B.—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage howsoever caused, and occurring to live stock of any description travelling upon the L. & Y. Railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey, some of the cattle became alarmed, broke out of the truck,

declaration of the plaintiff, made at the time of delivering the goods, that he will not be bound by such notice, vary the effect of it, unless unequivocally assented to by the carrier or his authorized agent.¹ Nor will such notice be defeated, by proof that the book-keeper, who received the goods, was conscious of or might have inferred their value.² (a) Thus, where one delivered goods of above

¹ Walker v. York, &c., 22 Eng. L. & Eq. 315. See 2 J. P. Smith, 107.

² Levi v. Waterhouse, 1 Price, 280.

and were injured. The truck was unfit and unsafe for the conveyance of cattle. Held, there was no implied stipulation that the truck should be fit for the conveyance of cattle, and the company were not liable. Chippendale v. Lancashire, &c., 7 Eng. L. & Eq. 395.

The plaintiff delivered to the defendants, a railroad, eighteen packages, described in the receipt as furniture. On the receipt, under the head "Conditions," were these words: "No claim for deficiency, damage, &c., will be allowed unless made in three days after the delivery of the goods; nor for loss, unless made within seven days of the time of delivery, and the company will not be answerable for the loss or detention of goods which may be untruly or incorrectly described in the receiving note." The plaintiff signed the paper, without reading the conditions or knowing what they were. One of the packages contained clothes, but no claim was made for them until after more than seven days. Held, the conditions furnished a good defence. Lewis v. Great, &c., 5 Hurl. & Nor. 867.

The defendants, being common carriers, received property of the plaintiff, at New York, for transportation to Brighton Locks, and stored it in their warehouse, at Albany, on the pier. On the same day a fire broke out in Albany, a quarter of a mile distant. It was very dry, the wind blew with great violence, and the fire spread rapidly. The defendants' warehouse, and other warehouses on the pier, were consumed, and a portion of the property received of the plaintiff for transportation. When the goods were received at New York, the defendants gave a receipt, or shipping-bill, by which they agreed to transport the goods to Brighton Locks, "the danger of the lakes, of fire, and the acts of Providence excepted." Held, though the loss was not the result of inevitable accident, or the act of Providence, the defendants had a right to limit their liability, and, having

expressly excepted the risk of fire, were not liable. Parsons v. Monteath, 13 Barb. 353.

A, an agent of the consignor of goods, delivered to B, a carrier's agent, for transportation, filled a blank in a printed receipt prepared by the carrier, stipulating against liability beyond the sum of \$50, — the manuscript merely describing the articles and their value, and naming the consignor and consignee and place of ultimate delivery, — but neither read nor understood the conditions of the receipt, nor signed any printed indorsement acknowledging acceptance of the conditions, and the consignor never saw the receipt until the goods were lost. Held, A was a competent witness to prove he did not read or understand, and did not accept the conditions, and the carriers were liable for a loss of the goods to their full value. Adams' v. Nock, 2 Duv. 562.

To render a railway liable, beyond 50*l.*, under 17 & 18 Vict. c. 31, § 7, for an injury to a horse carried by it, the declaration of value must be such as to convey a distinct intimation that the sender intends to hold the company responsible for the higher value. It is liable therefore for refusing to carry a mare, unless insurance money should be paid, when no such declaration was made, although the company knew that the value exceeded 50*l.* Robinson v. London, 19 C. B. N. S. 51.

(a) As § 2041 (Geo.) allows a common carrier to make an express contract to control his liability, he may show by parol that he did make such a contract, although a receipt given by his clerk, who knew nothing of the special contract, contained no reference to it. Purcell v. Southern Ex. Co., 34 Geo. 315.

A carrier's receipt acknowledging the delivery of goods is merely *prima facie* evidence of the fact; and parol evidence is admissible, to prove such facts as will show that the written instrument

£5 value to common carriers to carry by the mail, paying no extra price; and by a public notice, which had before reached the owner, the carriers had declared that they would not be accountable for any package above the value of £5, unless insured and paid for accordingly: held, the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the £5.¹

§ 21. But, on the other hand, it has been held, that a common carrier cannot restrict his liability, as such, by a mere notice,² (a) even if brought to the knowledge of the owner of the property; though his liability may be limited by express agreement.³ (b) And it has been held that the charter of a railroad is in the nature of a contract between the company and the State, permanently binding upon each; and the principal engagement on the part of the company is, that they shall become and continue to remain *common carriers*. Their liability as common carriers, consequent upon the contract, and the law appertaining thereto, becomes irrevocably fixed. They cannot alter or modify this liability by any stipulation or contract.⁴

§ 22. With regard to the general right of a carrier to be informed of the nature and value of the property intrusted to him; it is held, that a person delivering property, which requires peculiar care and attention for its safe transportation, to a common carrier, should make known to him the necessity, in order that proper precaution may be used; ⁵—that he may require the value of the goods to be made known to him, and may take advantage

¹ Nicholson v. Willan, 5 E. 507; 2 J. P. Smith, 107. See Garnett v. Willan, 5 B. & Ald. 53; Baltimore v. Brady, 32 Md. 333; Danehy v. Sillaman, 2 Lans. 361; Southern v. Crook, 44 Ala. 468; Blossom v. Dodd, 43 N. Y. 264.

² Fish v. Chapman, 2 Kelly, 349. See Hart v. Baxendale, 6 Eng. L. & Eq. 468.

³ Dorr v. The New Jersey, &c., 1 Kern. 485; Mercantile, &c. v. Chase, 1 E. D. Smith, 115.

⁴ Michigan, &c. v. Ward, 2 Mich. 538. Contra, 1 E. D. Smith, 115.

⁵ Wilson v. Hamilton, 4 Ohio, N. S. 722.

never had any legal existence or binding force, and that it was given under such circumstances that it failed to contain the agreement of the parties. Ibid.

(a) The prevailing rule is, that a common carrier can only *limit*, but not wholly *avoid*, his common-law liability, by means

of a public notice. 1 Pars. on Cont. 708 and n.; 2 Greenl. Ev. § 215.

(b) The agreement must be affirmatively proved. But it need not be in writing, and may be shown by usage. American, &c. v. Moore, 5 Mich. 368; Cooper v. Berry, 21 Geo. 526.

of fraudulent acts of his employers.¹ Thus, a carrier is not liable for the loss of a box containing valuable articles, when it is so disguised as to resemble those which generally contain articles of small value, and no notice is given him of the contents.² So if a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party does not tell him there is money in it. But if the carrier asks, and the other answers in the negative; or if he accepts it conditionally, provided there is no money in it; the carrier is not liable.³ So where the price of the carriage of money is greater than that of other goods, and the carrier is paid only for common goods, and is ignorant that the parcel contains money, he is not liable.⁴ So it is held, that the reward ought to bear proportion to the risk. If money or jewels are sent, denying or concealing that it is money or jewels, the carrier is not answerable. As where notes to the amount of £100 were packed in an old mail-bag, and stuffed with hay, to give it a mean appearance, and in this state delivered to a carrier, and the bag arrived safe, but the notes were stolen.⁵ So a person, who delivers to the agent of a railroad merchandise, jewelry, and other valuables for transportation under the semblance of baggage, is guilty of fraud, which releases the company from liability as common carriers. They are liable only as common bailees for hire.⁶ But, on the other hand, it is held, that, if A inclose money in a parcel of goods belonging to B, and B send the parcel to C, a common carrier, and the parcel be lost; A may maintain an action against C for the money, although he did not tell the carrier that money was contained in the parcel, and although he only received the rate of carriage for goods.⁷ So, to an action against the defendants, as common carriers, for refusing to carry a package of the plaintiff, the defendants pleaded, that, when the package was tendered, they requested the plaintiff to inform them of its contents, and that the plaintiff refused to do so, wherefore, and because the defendants did not know what the package contained, they refused to receive and carry it. Held, a bad plea; for a carrier has no general right, in every case, and under all circumstances, to be informed of the contents of packages tendered to him to be carried.⁸ So, in an old case, the plaintiff

¹ *Fish v. Chapman*, 2 Kelly, 349; *Helman v. Holladay*, 1 Woolw. 365.

² *Warner v. Western*, 5 Rob. (N. Y.) 490.

³ *Titchburne v. White*, 1 Str. 145.

⁴ *Ibid.* (note).

⁵ *Gibbon v. Paynton*, 4 Burr. 2298.

⁶ *Cincinnati v. Marcus*, 38 Ill. 219.

⁷ *Drinkwater v. Quenell*, 7 Mod. 248.

⁸ *Crouch v. London, &c.*, 25 Eng. L. & Eq. 287.

delivered to a carrier's porter a box, telling him that it contained a book and tobacco, when it also contained £100. Notwithstanding a direction from Chief Justice Coke, that, in consideration of the intended cheat upon the carrier, the jury might consider him in damages, they gave a verdict for £97, abating £3 for the carriage.¹ (a)

§ 23. A special agreement, limiting the liability of common carriers, though general in its terms, does not release the carriers from losses resulting from negligence, more especially if gross, or from fraud ;² or in case of a deliberate and intentional violation of contract.³ Thus a carrier had given notice, that he would not be answerable for parcels of value, unless entered and paid for as such ; and the plaintiffs, having notice, delivered a parcel, containing bank-notes to a large amount, without informing the carrier of its contents. The coach was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it ; and during this time the parcel was stolen. Held, the two questions were properly left to the jury : first, whether the plaintiffs had been guilty of any unfair concealment ; and, secondly, whether the carrier had been guilty of gross negligence.⁴ So the plaintiffs sent goods packed in a box by the defendant's wagon.

¹ Kenrig v. Eggleston, Aleyn, 93. (The reporter adds, *quod durum videbatur circumstantibus*. And see Gibbon v. Paynton, 4 Burr. 2301.)

² Boswell v. Hudson, &c., 5 Bosw. 699 ; Ashmore v. Pennsylvania, &c., 4 Dutch. 180 ; Welsh v. Pittsburg, &c., 10 Ohio, N. S. 64 ; Bissell v. N. Y., &c., 29 Barb. 602 ; 25 N. Y. 442 ; Stoddard v. Long Island, &c., 5 Sandf. 180 ; Beck v. Evans, 16 E. 244 ; Pennsylvania, &c. v. McCloskey, 23

Penn. 526 ; Birkett v. Willan, 2 B. & Ald. 356 ; Macklin v. Waterhouse, 2 Moo. & P. 319 ; Duff v. Budd, 3 Brod. & B. 177 ; Davidson v. Graham, 2 Ohio, N. S. 131 ; Goldey v. Pennsylvania, &c., 30 Penn. 242 ; School v. Boston, 102 Mass. 552 ; Southern v. Crook, 44 Ala. 468 ; Christenson v. American, 15 Minn. 270.

³ Keeney v. Grand, 59 Barb. 104.

⁴ Batson v. Donovan, 4 B. & Ald. 21.

(a) See Hopkins v. Westcott, 6 Blatch. 64 ; Burroughs v. Norwich, 100 Mass. 26 ; Farnham v. Camden, 55 Penn. 53.

The carrier's liability may be restricted by notice in case of delicate or valuable articles. So as to loss by fire. Smith v. North, 64 N. C. 235 ; Chamberlain v. Weston, 44 N. Y. 305.

So as to losses arising through the default or negligence of any other person, corporation, or association, to whom the property shall be delivered by the company, for the performance of any act or duty in respect thereto, at any point or place off the established routes or lines run by the company. So as to loss or damage of any box or package for over \$50, unless the just and true value is

stated in the receipt ; or, for property not properly packed, or fragile fabrics not so marked upon the package, or fabrics consisting of or contained in glass. Boorman v. American, 21 Wis. 152.

The plaintiff delivered to the defendants, a railway, horses for transportation, and at their request signed a declaration that the value did not exceed \$10 per horse. The horses were injured by a defective truck. Held, the declaration of value was no part of the contract, but the basis of the intended contract, by which it was to be regulated and governed, and therefore the plaintiff could not deny its truth, and prove that the real value exceeded £10 each. McCance v. London, 3 Hurl. & Colt. 343.

The box was placed with its lid outwards, at the tail of the wagon, which was left, during several hours in the night, standing in a road opposite an inn, where the wagoner stopped, without any person to watch it. The box was forced open and its contents abstracted. A notice was proved, limiting the carrier's responsibility to £5. Held, the carrier was guilty of gross negligence in leaving the wagon so exposed, and consequently liable for the loss.¹ So, in an action against a coach-proprietor, for the loss of a trunk containing wearing apparel and jewels, the value of which was not disclosed by the plaintiff, nor asked by the defendant, the jury were directed to consider whether the defendant had been guilty of gross negligence, without reference to the non-disclosure of the value of the article. The jury having found for the plaintiff, the court refused to set aside the verdict.² So an exception of "the dangers of the lake," in a contract to convey goods from New York to Ogdensburg, does not exempt the carrier from liability for loss happening through want of ordinary care.³ So where a common carrier stated, in his bill of lading, that he would not be liable for breakages of goods in boxes; held, he was liable for such breakages caused by the negligence of his servants.⁴ So where a valuable bank-parcel, sent by a stage-coach, is lost, and it is proved, that, on arrival of the coach, the driver was in liquor, and that the book-keeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it; held, a loss arising from gross negligence, and that the proprietors were liable, notwithstanding the usual notice.⁵ So, if notice is given by a steamboat, that it will not be liable for baggage unless checked; it is still liable for the loss of baggage delivered to an agent, but not checked, because the person intrusted with this duty was not present.⁶ So a common carrier by water gave notice, that "he would not be responsible for any loss or damage to any cargo put on board his vessels, unless it happened by want of ordinary care and diligence in the master or crew, and then only to £10 per cent on the amount of the loss, and not beyond the value of the vessel and the amount of her freight; and that, if any person desired to have goods

¹ Langley v. Brown, 1 Moo. & P. 583.

² Brooke v. Pickwick, 12 Moore, 447.
See Bodenham v. Bennett, 4 Price, 31;

Lowe v. Booth, 13 Ib. 329.

³ Slocum v. Fairchild, 7 Hill, 292.

⁴ Reno v. Hogan, 12 B. Monr. 63.

⁵ Bodenham v. Bennett, 4 Price, 31.

⁶ Freeman v. Newton, 3 E. D. Smith, 246.

carried free of any risk, in respect of loss or damage, whether by the act of God or otherwise, they must make a special agreement on payment of extra freight." (a) Held, the carrier was answerable for the whole of any loss or damage arising by his own default; as in case the vessel, at the time of loading, were leaky and not seaworthy; that the notice applied only to losses by reason of *the default of others*, not of himself.¹ (b) And

¹ *Lyon v. Mells*, 1 J. P. Smith, 478 (a).

(a) In the same case, elsewhere reported, it is held, that a carrier *by water*, contracting to carry goods for hire, impliedly promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay ten per cent upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the personal default of the carrier himself (such as not providing a sufficient vessel), is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself, by a special acceptance, from the responsibility cast upon him by the common law, for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon v. Mells*, 5 E. 428.

(b) In August, 1839, A, an express carrier, entered into a contract under seal with the defendants, proprietors of a line of steamboats running between New York and Stonington, by which, for a certain sum per month, during the year 1839, A was to have the privilege of transporting a crate of a specified size ("contents unknown") on the boats; the crate and contents at all times to be at the risk of A, and the proprietors not in any event to be responsible either to A or his employers for the loss of any goods, &c., transported by A; and A to annex to his advertisements and receipts the following, viz.: "Take notice: A is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to its contents at any time;" which clause was so annexed

by A. This contract, having expired, was resumed for one year by parol agreement. The company gave notice by public advertisement, that all goods, specie, &c., shipped on their steamers must be at the risk of the owners; and inserted in their bills of lading an exception from their liability for the danger of fire, water, &c.; and a special notice that the company were to be held responsible for ordinary care and diligence only. In January, 1840, A received from a bank in Boston, checks and drafts on New York, on which he was to collect the specie in New York, and transmit the proceeds to Boston. On the 13th of January, A shipped in his crate, on board the Lexington, one of the company's boats, a large amount of specie for the Boston bank. The boat was destroyed by fire on the passage, and the money lost. The bank filed a libel in admiralty against the defendants, to recover their money. It appeared, that one hundred and fifty bales of cotton were stowed on and along the boiler-deck and around the steam-chimney, within about one foot of the casing of the same, which was of pine, and within a few inches of the pipe, the cotton extending from the boiler to within a foot of the upper deck; that the fire was discovered soon after it broke out, and probably might have been extinguished with a few buckets of water had the boat then been stopped; instead of which the wheel was put hard a-port, in doing which the wheel-rope parted, and all control of the boat was lost; that the fire-engine on board, and the hose belonging to it, were stowed in different places in the boat, by reason of which it could not be brought into play; and that only two or three buckets could be found, and only one fitted with a heaving line, the specie-boxes being emptied and used to carry water. By act of Congress (5 Sts. at Large, 306), such boat was required to be furnished with suction-hose and fire-engine, in good order, on every trip, and also with iron rods or chains instead of

an express provision against a carrier's own negligence does not exempt him. Thus, an indorsement upon a "drover's pass," declaring the carrier not liable for negligence, is against public policy and void.¹ So a parcel, which, with its contents, exceeded £5 in value, having been delivered to A and B, common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which A was one of the proprietors, but in which B had no concern; and the parcel was lost. The carriers had previously given the customary notice. Held, they were responsible.² So a parcel containing country banker's notes, of the value of £1300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was

¹ *Cleveland v. Curran*, 19 Ohio St. 1; *Cincinnati v. Pontius*, Ib. 221; *Knowlton v. Erie*, Ib. 260.

² *Garnett v. Willan*, 5 B. & Ald. 53.

tiller-ropes. Held, the respondents were guilty of gross negligence; that neither their special contract with A, nor their public notices, exempted them from liability for gross negligence; that the libellants were entitled to recover; and that it was not necessary that the proceeding should be instituted in the name of A. *New Jersey, &c. v. Merchants', &c.*, 6 How. (U. S.) 344.

It is held, that, where there is a special acceptance of goods, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier. *Swindler v. Hilliard*, 2 Rich. 286. But see *Slocum v. Fairchild*, 7 Hill, 292; *Fish v. Chapman*, 2 Kelly, 349.

The plaintiffs declared against the defendants as common carriers, subject to the terms of a special notice, for the loss of a truss of silk, by their gross negligence, and the felonious acts of their servants. The defendants pleaded, except as to the gross negligence and felony, that the goods were such as are excepted in the Carriers' Act, and that the defendants did not declare their value. The plaintiffs new assigned, that they had brought action, for that the defendants' servants had feloniously stolen the goods. The new assignment was held bad on demurrer; and the plaintiffs were al-

lowed to amend on payment of costs, and to reply that the goods were lost by the felony of the defendants' servants, through the gross negligence of the defendants. Held, also, that the allegation of gross negligence and felony in the declaration was surplusage, and that a replication of felony only without an allegation of gross negligence would have been bad. *Butt v. Great Western, &c.*, 7 Eng. L. & Eq. 443.

In an action against a railway for the loss of a parcel, a replication, that the loss arose from the felonious acts of the defendants' servants, is a good answer to a plea founded upon the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, § 1, that the value exceeded £10, and was not declared at the time of delivery to the carrier. *Metcalf v. London, &c.*, 4 C. B. N. S. 307.

The goods consisted of jewelry, &c., in a tin box, enclosed in a deal box fastened with a padlock. The box was brought to the station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London. When the box was delivered to the plaintiffs there by a porter of the company, the outer box had been opened, and the tin box and its contents abstracted. Held, no evidence of a felony by the company's servants. *Ibid.*

lost. The carriers had previously given notice that they would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, held, notwithstanding, that the carrier was responsible for the loss.¹ (a)

§ 24. A carrier's notice, limiting his liability, is not available, if it appears that it did not come to the knowledge of the customer.² Thus notice is not binding upon a person unable to read;³ nor where the advantages of the mode of carriage were stated in large, and the conditions and exemptions in small, letters.⁴ And it is held that a mere general notice, when brought to the knowledge of the owner of the goods, will not avail, unless

¹ *Sleat v. Fagg*, Ib. 342.

² *Kerr v. Willan*, 6 M. & S. 150. See *Riley v. Horne*, 5 Bing. 217; 2 Moo. & P. 331; *Camden, &c. v. Baldauf*, 16 Penn. 67.

³ *Simons v. Great, &c.*, 29 Law Times, 182; *Davis v. Willan*, 2 Stark. 279.

⁴ *Butler v. Heane*, 2 Campb. 415.

(a) The prevailing rule of law upon this general subject has been thus expressed: "The weight of authority seems to be in favor of the doctrine that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, as an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence" (or gross negligence, as sometimes explained), "and the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium; but still he undertakes to carry, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the burden of proof of damage or loss by want of such care, would lie upon the plaintiff." Per Parke, B., *Wyld v. Pickford*, 8 M. & W. 443.

In a late case, the defendants undertook to transport goods from A to B, and "deliver to address," but the receipt, signed by them only, stated, that they are "not to be responsible except as forwarders." The goods being lost by the negligence of the employees of a steamboat, owned and controlled by other parties, but ordinarily used for transportation by the defendants; held, the managers and employees of the boat were, in reference to the owner of the goods, the managers, &c., of the defendants, and they were liable for the loss. *Hooper v.*

Wells, (California) Law Reg., Nov. 1865, p. 16. See *Indianapolis v. Allen*, 31 Ind. 394; *Penn. v. Butler*, 57 Penn. 335; *Farnham v. Camden, &c. R.R. Co.*, 55 Penn. 53; *American Express Company v. Sands*, Ib. 140; *Stedman v. Western*, 48 Barb. 97; *Mann v. Birchard*, 40 Vt. 326; *Baltimore v. Skeels*, 3 W. Va. 566; *Evansville v. Young*, 28 Ind. 516; *The City*, 4 Ben. 271; *Keeney v. Grand*, 47 N. Y. 525.

Disobedience of instructions renders the carrier liable. *Express v. Kountze*, 8 Wall. 342; *Lamb v. Camden*, 2 Daly, 454.

Where goods are lost or damaged while in the possession of a carrier, under a special contract which limits his liability, and he gives no account how the loss or damage occurred; the burden being on him, there is a presumption of negligence, and he is liable for the full value of the goods. *American v. Sands*, 55 Penn. 140; *Baltimore v. Brady*, 32 Md. 333.

Where there is a contract against liability for fire, the burden is on the owner to show negligence. *Lamb v. Camden*, 46 N. Y. 271.

A railroad does not sustain the burden, of *prima facie* showing that the loss was not caused by its neglect, by proof that the transaction occurred during the war, and that the road was frequently used by the military authorities, and there was a great want of safety and certainty in the transportation of freight. *Mobile v. Jarboe*, 41 Ala. 644.

there is very clear proof that the owner expressly assented to it, as forming the basis of the contract; though a carrier may, by general notice, brought to the knowledge of the owner, limit his responsibility for carrying certain commodities beyond the line of his general business, or make his responsibility depend upon certain reasonable conditions.¹ Thus, in case of such notice, the carrier's agent told the female servant of the owner of a parcel, that it ought to be insured. Held, not sufficient.² So, where the plaintiff had for three years taken a newspaper in which the notice was advertised every week; the jury still having found a verdict for the plaintiff, the court refused to grant a new trial.³ So, in an action against coach-proprietors for the loss of a parcel, the defendants proved a notice, exposed in a booking-office at Salisbury, kept by a person named Weeks. One Weeks was a defendant on the record; but no evidence was offered, that he was the Weeks above mentioned. Held, not a sufficient notice.⁴ But where an agent, employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank-notes to a common carrier, to be forwarded to his principals in London, which parcel was lost; and the carriers had given notice, that they would not be accountable for parcels containing bank-notes; and the agent had no knowledge of such notice, but the principals had: held, it was their duty to have instructed their agent not to send bank-notes by that carrier, and the latter was not responsible.⁵ (a)

¹ Farmers', &c. v. Champlain, &c., 23 Vt. 186.

² Macklin v. Waterhouse, 5 Bing. 212.

³ Mackley v. Horne, 10 Moore, 247; 3 Bing. 2.

⁴ Macklin v. Waterhouse, 2 Moo. & P. 319.

⁵ Mayhew v. Eames, 3 B. & C. 601; 5 Dowl. & R. 484.

(a) It is held that the notice must be either notorious or actually known. That it was posted in a boat, is not sufficient. *Macklin v. N. J.*, 7 Abb. Pr. N. S. 229.

Nor by publication, or entry on receipts rendered or tickets sold. *Southern v. Newby*, 36 Geo. 635; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, Ib. 283.

At most, the possession of a receipt by the shipper, which contains conditions restricting the liability of the carrier, is but *prima facie* evidence of assent, and parol evidence is admissible to show the contrary. In case of a previous oral agreement, the shipper has a right to assume that his agreement is embraced in the receipt, or at least that his receipt con-

tains nothing to the contrary. If otherwise, it is in the nature of a fraud on the part of the carrier. *Strohn v. Detroit*, 21 Wis. 554.

A consignor, who sends goods by express, and takes a receipt for them without dissent, is not therefore bound by all the conditions expressed in such receipt. *Michigan v. Mineral*, Am. Law Rev., vol. viii., No. 1, Oct. 1873, p. 159.

That an employer has seen a notice, is no presumption of his assent; the burden of proof is on the carrier. *McMillan v. Michigan*, 16 Mich. 79.

Where goods were delivered to the carrier before the owner received a restrictive receipt, and a portion of the notice was so covered up by a revenue stamp

§ 25. A carrier may undoubtedly *waive* his rights arising from the notice referred to. But a carrier, who had given notice that he would not be liable for loss or damage, unless occasioned by the actual negligence of the master or mariners, was held not to have waived that notice, by having on former occasions made allowances to the plaintiffs for damage, without inquiring into the cause of such damage.¹

§ 26. It is held, that the duty and liability of a common carrier may be modified by the particular *usage* of the carrier, without proof that the consignor had knowledge of such usage.² (a)

§ 27. The liability of a common carrier of *passengers* is somewhat different from that of a carrier of merchandise. (b) It is

¹ Evans v. Soule, 2 M. & S. 1.

² Farmers', &c. v. Champlain, &c., 18 Vt. 131.

that it could not be read intelligibly; held, the jury could not properly find any assent to the notice. Perry v. Thompson, 98 Mass. 249.

Knowledge and assent is a question of fact for the jury, to be determined by evidence *aliunde*. Adams Ex. Co. v. Haynes, 42 Ill. 89.

(a) An accident having happened from lashing two flat-boats together, the carrier may show a custom so to navigate the river. Johnson v. Lightsey, 34 Ala. 169.

But it has been held, that a common carrier upon a canal cannot, in the absence of an express contract, limit his liability, by showing that, by a custom on the canal, carriers are not liable for losses resulting from the dangers of the navigation, from fire, or from inevitable accident. Coxe v. Heisley, 19 Penn. 243.

The owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown. Whitmore v. Steamboat Caroline, 20 Mis. 513.

The question of custom is for the jury. Huston v. Peters, 1 Met. (Ky.) 558.

In an action against an express company for the loss of a diamond pin consigned to a student at a college; held, if it was the custom of the president to receive from the defendant parcels directed to the students, and receipt therefor, or if it was in accordance with the rules of the college that he should do so, then he might properly be considered as the authorized agent of the students for that purpose, and the jury might presume a good delivery to the student from a de-

livery to the president. Southern v. Everett, 37 Geo. 688.

(b) A recent case decides the nature and requisites of this liability, in reference to the *party* upon whom a claim may be made. The defendant owned steamers running between New York and the eastern part of the transit route across the Isthmus of Nicaragua; also part of a line from the western point of that route to San Francisco. The transit company furnished him with passage-tickets across the isthmus, which he sold to passengers from New York, returning those he did not sell, and not acting as agent of the transit company. Over the door of his office he had a sign, headed "Vanderbilt's line between New York and San Francisco," signed "Allen, agent." The advertisement set forth the route, and its advantages over others. The agent at the office sold the plaintiff three tickets for a gross sum, setting forth that he was to be carried to and across the isthmus, and from the western point of the transit to San Francisco in a certain vessel. A card signed by his name was also delivered, stating that passengers are carried without delay over the isthmus. The plaintiff was detained on the isthmus. Held, the jury were warranted in finding, that the defendant contracted as principal for prompt carriage across the isthmus, and that he was liable for the detention. Quimby v. Vanderbilt, 17 N. Y. 306.

In regard to the obligation of a carrier of passengers to carry *all persons* who apply; it is held, that the proprietor of a steamboat may exclude from the boat the agent of a rival line of stages to that, which by contract carries passengers for

said, "The carrier of goods has absolute control over them while they are in his hands; he can fasten them with ropes, or box them up, or put them under lock and key. But the carrier of passengers must leave to them some power of self-direction, some freedom of motion, some care of themselves."¹ Upon this ground is founded the well-established rule, that, instead of being liable for all losses, except those resulting from the act of God or the public enemy; in the case of common carriers of passengers, the highest degree of care and diligence, which a reasonable and cautious man would use, is required by law. (a) This rule applies alike to the character of the vehicle, which must be *road-worthy*, the horses, which must be well broken and steady, the harness, the skill, caution, and sobriety of the driver, his knowledge of the road, watchfulness, and his conduct under every emergency or difficulty. The contract to carry passengers differs from that to carry freight only in this, that, in the latter case, the carrier is responsible at all events, except for the act of God and the public enemy.² (b) Thus passenger-carriers by stages are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage. If the coach was upset by the running of the horses, and they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the running off of the horses might have been prevented, if the horses had been properly harnessed, or

¹ 1 Pars. on Cont. 695. See *M'Clenaghan v. Brock*, 5 Rich. 17; 23 Ill. 357; *Willis v. Long, &c.*, 32 Barb. 398; *Wells v. New York, &c.*, 24 N. Y. (10 Smith) 181; *Perkins v. New York, &c.*, Ib. 196; *Hooper v. Wells*, 27 Cal. 11.

² *Caldwell v. New Jersey*, 47 N. Y. 282; *Chisholm v. Northern*, 61 Barb. 363; *Maverick v. Eighth*, 36 N. Y. 378; *Johnson v. Winona*, 11 Minn. 296; *Knight v. Portland*, 56 Me. 234; *Brockway v. Lascala*, 1 Edm. Sel. Cas. 135; *Hanley*

v. Harlem, 1 Edm. Sel. Cas. 359; *Sawyer v. Dulany*, 30 Tex. 479; *Derwort v. Loomer*, 21 Conn. 245; 11 Gratt. 697; 9 Bing. 457; 4 Gill, 406; 3 M'Lean, 22; 16 Vt. 566; *Fuller v. Naugatuck, &c.*, 21 Conn. 557. See *Great, &c. v. Harrison*, 26 Eng. L. & Eq. 443; *Nolton v. Western, &c.*, 15 N. Y. 444; *Derby v. Philadelphia, &c.*, 14 How. 468, 483; *Sales v. Western, &c.*, 4 Iowa, 547; *Edwards v. Lord*, 49 Me. 279; *Clark v. Eighth, &c.*, 32 Barb. 657.

the boat, he being on board for the purpose of soliciting passengers. *Jencks v. Coleman*, 2 Sumn. 221.

A carrier is bound to carry a passenger, though he has contracted not to carry passengers coming by a particular line. *Bennett v. Dutton*, 10 N. H. 481.

(a) The requisition, of such care and diligence as is characteristic of cautious persons, is not sufficiently strict. *McLean v. Burtant*, 11 Minn. 277.

(b) Proof that the plaintiff was a passenger, of the accident and the injury,

makes a *prima facie* case of negligence; and the burden of proof is on the defendant to rebut it. *Galena, &c. v. Yarwood*, 17 Ill. 509.

Running off the track of a railroad is *prima facie* evidence of negligence. *Yonge v. Kinney*, 28 Geo. 111.

With more particular reference to railroads, see *Buffit v. Troy, &c.*, 36 Barb. 420; *Chicago, &c. v. Hazzard*, 26 Ill. 373; *Virginia, &c. v. Sanger*, 15 Gratt. 230.

if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake: the proprietors are liable. Or if the quantity of baggage on the top of a stage-coach causes it to upset. And where a passenger is injured by the overturning of the coach, the *primâ facie* presumption is, that it occurred by the negligence of the coachman, and the burden of proof is on the proprietors of the coach, to establish that there was no negligence whatsoever; and, although this presumption may be repelled, by proof that the coach was reasonably strong, with suitable harness, trappings, and equipments, of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the running off of the horses caused the overturning of the coach, and such running off might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable.¹ Or if the superintendent of a stage allows a person other than the regular driver to drive it.² It is said, the obligation of a stage-proprietor has respect to the team, the load, and the state of the road, as well as the manner of driving; therefore, evidence in reference to each of the above-mentioned points is admissible.³ And although the accident may have occurred through the recklessness of the driver of another stage, who may be liable, and also his employers; yet, if there is any want of skill and prudence, in the driver of the stage to which the accident occurred, his principals are liable.⁴ So for a crack in the iron axle of a car, though not discoverable by any practicable mode of examination.⁵ And, in general, if an accident happen from a defect in the construction of the vehicle, the proprietor is held liable, although the defect be out of sight, and not discoverable upon ordinary examination.⁶

§ 27 *a*. But a less rigid rule has been adopted in some recent decisions. It is held, that, if an accident happens from a defect in the coach which might have been discovered by the most careful examination, the carrier is responsible. But it is otherwise, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could

¹ Farish v. Reigle, 11 Gratt. 697; Boyce v. California, &c., 25 Cal. 467; Fairchild v. California, &c., 13 Cal. 599.

² Tuller v. Talbot, 23 Ill. 357.

³ Taylor v. Day, 16 Vt. 566.

⁴ Peck v. Neil, 3 M'Lean, 22, 26.

⁵ Alden v. New York, &c., 26 N. Y. (12 Smith), 102.

⁶ Sharp v. Grey, 9 Bing. 457; 2 Moo. & S. 620. See Baltimore v. Worthington, 21 Md. 275.

not be guarded against by a sound judgment and the most vigilant oversight.¹ So it is held, that the proprietor of a stage-coach is not liable, for an injury sustained by a passenger, in consequence of the accidental overturning of the coach, unless occasioned by the negligence or misconduct of the driver. Therefore, where the cause of the accident was the removal, since the coach had last passed, of one of two cottages, which had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road (it being night, though moonlight), and the judge told the jury, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits, and a verdict was found for the plaintiff; the court granted a new trial, upon the ground that it should have been left to the jury to say, whether or not the driver had been guilty of negligence.² (a)

§ 27 *b*. A carrier of passengers is bound to allow them sufficient time and opportunity to leave the vehicle, and the passengers are bound, on their side, to use reasonable care and diligence to leave the vehicle, and to avail themselves of the opportunity offered them to do so.³ The liability of a railroad for the safety of passengers ceases, after they have been made aware of their arrival at the place of destination, and have had a reasonable time to get off the train. Such reasonable time is the time within which persons of ordinary prudence in like circumstances get off the cars.⁴

§ 28. It has been formerly held, that a coachman is not liable for the loss of *goods* of his passenger, for the carriage of which he is not paid.⁵ (b) But the contrary rule is now adopted, that, in a

¹ *Ingalls v. Bills*, 9 Met. 1. See *Ware v. Gay*, 11 Pick. 106; *Stokes v. Saltonstall*, 13 Pet. 181; *Farish v. Reigle*, 11 Gratt. 697; *Hegeman v. Western*, 13 N. Y. 9; *Readlead v. The Midland*, L. R. 2 Q. B. 413.

² *Crofts v. Waterhouse*, 11 Moo. 133.

³ *Southern v. Kendrick*, 40 Miss. 374; *Jeffersonville v. Hendrick's*, 26 Ind. 228.

⁴ *Imhoff v. Chicago*, 20 Wis. 344.

⁵ *Upshare v. Aidee*, 1 Com. 24.

(a) The general rule does not apply to a mere private conveyance, without compensation. Thus the plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken. Held, the plaintiff was not entitled to damages for the personal injury. *Lygo v. Newbold*, 24 Eng. L. & Eq. 507.

While the right to be carried by a common carrier of passengers is a right

superior to the rules and regulations for the accommodation of passengers, their accommodation while being transported is subject to such general rules as the carrier may think proper to make, provided they are reasonable. Whether reasonable, is a question of law and fact, to be found by the jury, under instructions. *Day v. Owen*, 5 Mich. 520.

(b) The peculiar arrangements of railroad corporations have given rise to a new form or evidence of liability for baggage. A *check* is said to stand in the place of a bill of lading. *Dill v. Railway Co.*, 7

suit against stage-owners for loss of *baggage*, payment of the fare need not be expressly proved. It may be inferred. And even if

Rich. 158. See *Fleming v. Mills*, 5 Mich. 420.

The delivery of a check is *prima facie* evidence that the company has the baggage. *Davis v. Michigan, &c.*, 22 Ill. 278.

If, on a change of passage from one railroad to another, the agent of the road does not find the baggage which is checked, he should give immediate notice to the owner, or the latter company will be liable. *Ibid*.

Where different roads, forming a continuous line, run their cars over the whole line, sell through tickets, and check the baggage through; either company is liable for a loss. *Hart v. Rensselaer, &c.*, 4 Seld. 37.

A railroad corporation created by the laws of Ohio, for the transportation of freight and passengers between Toledo and Cleveland, entered into an arrangement with two other railroad companies, by which passage tickets were sold and baggage checked over these roads to Buffalo. B purchased a passage ticket over all the roads from Toledo to Buffalo, and delivered her baggage to the defendant's baggage-agent, and received a check entitling her to receive such baggage at Buffalo. The cars were detained on the road, and did not arrive at Buffalo till late at night, and, other trains arriving at the same time, there was an unusual crowd of passengers and an accumulation of baggage. B. did not claim her baggage that night, and the next morning it could not be found, and was supposed to have been destroyed by a fire which burnt the car-house and a large quantity of baggage during the night. Held, that B, under these circumstances, was not required to demand her baggage on the evening of its arrival at Buffalo, and that the defendant was responsible for the loss of it during the night. *Cary v. Cleveland, &c.*, 29 Barb. 35. See *Garvey v. Camden, &c.*, 1 Hilt. 280.

Held, the defendants had the power, under their charter, to contract to carry a passenger and baggage beyond the State of Ohio, and the terminus of their own railroad, and were liable for the loss of baggage upon other railroads over which they had contracted to carry it. *Ibid*.

The plaintiff, having bought a through ticket from Wisconsin to New York city with the option of going from Harrisburg to New York, either by the Allentown line or *via* Philadelphia, and having taken

a through check for baggage *via* the Allentown line, on reaching Harrisburg, concluded to go on *via* Philadelphia, and had his baggage rechecked by the defendant company. Held, no new contract was made by rechecking, but it was done in pursuance of the original agreement. *Candee v. Pennsylvania*, 21 Wis. 582.

The railroad was held liable where a checked trunk was removed to the baggage room, the door of which was not fastened, or insecurely so; the trunk broken open, and the contents stolen; and the passenger did not call for it till the second morning after arrival. *Mote v. Chicago*, 27 Iowa, 22.

Otherwise where a checked valise was left in the open depot, where baggage was usually kept in charge of a servant of the road, for nearly twenty-four hours after arrival, and stolen. *Holdridge v. Utica*, 56 Barb. 191.

A passenger purchased a ticket for herself and her baggage from one who purported to be an agent for the sale of tickets, and the conductors accepted it as evidence of her right to ride, marked it, and finally took it, shortly before arrival, and demanded no other fare. Held, in a suit for loss of the baggage, sufficient proof of an undertaking to transport her goods over the road until the contrary appeared. *Glasco v. New York, &c.*, 36 Barb. 557.

In a suit against the master of a steamer, for the value of a passenger's trunk, the only evidence was the deposition of one in whose care the plaintiff was at the time, that he caused the trunk to be placed on board the steamer, a short time before her departure. The court instructed the jury, that they must be satisfied that the trunk was delivered to the defendant, or to some officer of the boat authorized to receive it, on the part of the steamer. Held, a judgment for the plaintiff should not be reversed, on the ground that there was no sufficient evidence that the trunk was placed in the hands of the employees of the boat. *Forbes v. Davis*, 18 Tex. 268.

A railroad corporation will not be held liable for lost baggage, unless it is shown to have been in its possession, or that the company had contracted in some way to transport the baggage. *Michigan, &c. v. Meyres*, 21 Ill. 627.

Voluntary assistance by the agents of the company in looking for the baggage, or an offer, by way of gratuity, to pay on

not paid, the passenger is liable for it, and the owners are therefore bound to use ordinary diligence.¹ And a stage contractor is liable, as a common carrier, for the baggage of a passenger, within the weight which he is allowed to carry without paying freight; though no entry was made of the baggage on the way-bill kept by the stage contractor for his own use.²

§ 28 *a*. Carriers of passengers, with their ordinary baggage, for hire, are liable for any accident to the baggage while in their keeping as carriers, except those arising from the acts of God or a public enemy; and this liability *prima facie* continues until the safe delivery of the baggage to its owner. But when the passenger refuses to receive his baggage, or neglects to call for it within a reasonable time after the transit, the responsibility of the carriers is changed to that of a bailee, liable only for his own neglect. As where a passenger, who arrived at the place of destination with his trunk, neglected to receive it, and left it over night in the possession of the carriers, simply for his own accommodation, and it was destroyed with the company's buildings by fire, without fault on their part.³

§ 29. In regard to the kind, quantity, and value of articles, for which a carrier of passengers is responsible; by receiving the baggage of a traveller, including such articles as are necessary for his personal convenience, (a) who has engaged his passage, the carrier

¹ *M'Gill v. Rowand*, 3 Barr, 451. See *Dexter v. Syracuse*, 42 N. Y. 326; *Nordmeyer v. Loescher*, 1 Hilt. 499; *Dibble v. Brown*, 12 Geo. 217; *Wood v. Panama, &c.*, 5 Duer, 193.

² *Peixotti v. McLaughlin*, 1 Strobh. 468.

³ *Roth v. Buffalo*, 34 N. Y. 548.

account of it, will not render the company liable. *Ibid*.

Evidence that the personal baggage of a passenger on a railroad, who took passage in July, had been seen at the place of his destination in November following, cannot be given as proof of proper transportation and delivery of such baggage, in a suit against the company for the loss of it. *Glasco v. New York, &c.*, 36 Barb. 557.

Where the company employ porters at their stations, to carry baggage to the carriages taken by passengers; the company are held liable till delivery to the carriage. *Richards v. London, &c.*, 7 Com. B. 839. See *Stewart v. Lord*, 3 H. & C. 135; *R. E. Lee*, 2 Abb. (U. S.) 49; *Tower v. Utica, &c.*, 7 Hill. 47; *East, &c. v. Lythgoe*, 10 Com. B. 726.

If a passenger delivers a package to be carried by the passenger train, without

fraudulently representing it as baggage; he is liable to pay freight, and the railroad are responsible for its loss. *Butler v. Hudson, &c.*, 3 E. D. Smith, 571.

In regard to the party who may bring an action for loss of baggage; an action lies in favor of a father for the loss of his son's baggage, while the son was employed on his own business, and was furnished by the father with a travelling trunk, clothing, &c., for the purposes of the journey. *Grant v. Newton*, 1 E. D. Smith, 95.

Proprietors of a mail-coach line, used for carrying the mail, passengers, and their baggage, are not necessarily common carriers, as to articles not strictly within their line of business, but they become so by special contract or general course of business. *Powell v. Mills*, 30 Miss. 231.

(a) Personal use, comfort, instruction,

becomes immediately responsible for its safe delivery at the place of destination.¹ (a) Thus, where a carpenter took passage in a stage, and his trunk, containing clothing and tools to the value of \$55, was lost; held, the stage-proprietors were liable for all the contents of the trunk.² So a common carrier of passengers is liable for the amount of money which is required for the whole journey contemplated, and allowing for accidents and contingencies.³ As, for the amount of \$300 in bank-bills. So for a pocket-pistol and a pair of duelling-pistols,⁴ contained in a carpet-bag of a passenger, which is stolen from the carrier,⁵ or for a revolver,⁶ or an opera-glass.⁷ But not for money beyond the amount above specified, or intended for other purposes, unless in case of gross negligence;⁸ and liability for money to any amount has been denied.⁹ Nor for large sums of bullion, without paying freight therefor; nor for jewelry in the traveller's trunk, purchased by him and intended as presents for his friends;¹⁰ nor for masonic regalia, or engravings.¹¹ Nor will a jury be justified in allowing to the traveller a round sum for articles of jewelry, which he can neither describe nor identify otherwise than as "several articles of jewelry, being presents received, \$100."¹² (b) A notice, that a rail-

¹ Woods v. Devin, 13 Ill. 746; 9 Humph. 621; Louisville v. Mahan, 8 Bush, 135. See Macrom v. Great, 6 Q. B. 612.

² Porter v. Hildebrand, 14 Penn. 129.

³ Merrill v. Grinnell, 30 N. Y. (3 Tiff.) 594.

⁴ Illinois, &c. v. Copeland, 24 Ill. 332.

⁵ Woods v. Devin, 13 Ill. 746.

⁶ Davis v. Michigan, &c., 22 Ill. 278.

⁷ Toledo v. Hammond, 33 Ind. 379.

⁸ Jordan v. Fall River, &c., 5 Cush. 69; Johnson v. Stone, 11 Humph. 419; 22 Ill. 278.

⁹ Grant v. Newton, 1 E. D. Smith, 95.

¹⁰ Hutchings v. Western, &c., 25 Geo. 61.

¹¹ Nevins v. Bay State, &c., 4 Bosw. 225.

¹² 4 Bosw. 225.

amusement, or protection, having regard to the length and object of their journeys. *Parmelee v. Fischer*, 22 Ill. 212.

(a) A failure to deliver baggage at the terminus of a railroad line is not evidence of negligence on the part of a connecting line, who received the baggage and checked it over both lines. *Stimson v. Connecticut*, 98 Mass. 83.

A railroad, which receives the baggage of a passenger upon a train on which it is not bound to take it, to be transported over a portion of the road for which he has purchased a ticket, is subject, upon refusing to check the baggage, to the penalty provided in (Mass.) St. 1854, c. 23. *Commonwealth v. Conn.*, 15 Gray, 447. See *Wilson v. Chesapeake*, 21 Gratt. 654; *Burnell v. N. Y.*, 45 N. Y. 184.

In case of fire, a railroad is held not liable for baggage. *Louisville v. Mahan*, 8 Bush, 184.

(b) A common carrier is liable, where the valise of a passenger is received in the ordinary way, only for the value of his wearing apparel and personal effects, and a sum of money necessary to defray his travelling expenses. Not for money contained in a valise belonging to another passenger, and received as the property of the latter. *Dunlap v. International*, 98 Mass. 371.

Baggage is held to include a gold watch in a trunk. *American v. Cross*, 8 Bush, 472.

Held otherwise as to a gold watch and chain, gold ornaments for presents, and American coin. *The Ionic*, 5 Blatchf. C. C. 538.

A feather-bed in a steamship, not intended for use on the voyage, is not baggage. *Connolly v. Warren*, 106 Mass. 146.

The surgical instruments of a surgeon

road corporation would not "be liable for the baggage of passengers beyond a certain amount, unless," &c., printed on the back of the passage-ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party, *at the time of receiving the ticket*, and before the train leaves the station, had knowledge of the limitations or conditions; but it is a question for the jury.¹ And even a public notice, disclaiming liability except on certain conditions, will not excuse the carrier in case of gross negligence. Thus, a common travelling trunk, of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely: held, he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing; that, under these circumstances, the question for the jury was, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed.² (a)

¹ *Brown v. Eastern, &c.*, 11 Cush. 97.

² *Brooke v. Pickwick*, 4 Bing. 218.

See *Pianciani v. London, &c.*, 36 Eng. L. & Eq. 418.

are baggage. *Hannibal v. Swift*, 11 Law Reg. 126.

So manuscripts carried by a student, author, or professional man, in his trunk, for the purposes of the studies or business for which he travels. *Hopkins v. Westcott*, 6 Blatch. 64.

"Ordinary luggage," for which a railway company is responsible, does not include title-deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau, for the purpose of producing on a trial in a local court; or bank-notes (to a considerable amount) carried by him for the purpose of meeting the exigencies of the suit. *Phelps v. London, &c. R.R. Co.*, 19 C. B. N. S. 321.

Baggage does not include merchandise contained in a passenger's trunk. *Mississippi v. Kennedy*, 41 Miss. 671.

Nor a valise containing samples of goods delivered by an agent to the baggage-master as personal luggage. *Stimson v. Connecticut*, 98 Mass. 83.

The carrier is liable for baggage, though carried separately from the pas-

senger. *Wilson v. Chesapeake*, 21 Gratt. 654.

A passenger cannot recover for his expenses in searching for his baggage. *Miss. v. Kennedy*, 41 Miss. 671.

(a) See p. 580. In general, a notice of restricted liability, if clear and reasonable, will bind the passenger. *Smith v. New York, &c.*, 29 Barb. 32; 24 Ill. 466; *Nevins v. Bay &c.*, 4 Bosw. 225.

The *onus* of showing a special contract restricting the carrier's liability, or a cause of loss for which he is not responsible, is upon the carrier. Matter printed on the back of a railroad freight receipt is but a notice, not a part of the contract. *Western, &c. v. Newhall*, 24 Ill. 466.

Pursuant to the powers conferred upon them by a railway act, the company made certain regulations as to passengers' luggage; one, that they would not be responsible for articles not labelled and properly addressed; another, that all unclaimed property found on their premises or in their carriages should be deposited in a place called the lost property office, and restored to the owner on

§ 29 *a*. In an action against a stage contractor for the loss of a trunk, slight and *prima facie* evidence is admissible, of the contents of the trunk.¹ And it is held, that, in a suit by a passenger against a common carrier, to recover the value of baggage taken from a trunk, broken open and despoiled while in the possession of the carrier, the plaintiff's own evidence is admissible to

¹ Peixotti v. M'Laughlin, 1 Strobb. 468.

payment of a fee of 6*d*. for each article. They also gave private instructions to their servants, that "no small articles, such as rugs, coats, &c., are to be labelled or placed in the luggage-van; the passengers must take charge of such articles themselves, or send them as booked parcels." The plaintiff, a passenger, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of wearing apparel, wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless at the company's risk. The package was left behind, and was afterwards taken to the lost property office; where it was detained, and 6*d*. demanded for its restoration. Held, the company were not justified in refusing to carry the package at their own risk, and were responsible for its detention. *Munster v. South Eastern, &c.*, 4 C. B. N. S. 676.

In case of notice restricting liability to \$100, the carrier was held liable for a trunk, of over that value. *Nevins v. Bay, &c.*, 4 Bosw. 225.

Railroads are under obligation to take, in a car annexed to the passenger train, any baggage which may be delivered to them by the passenger as his personal baggage, and to convey it to the point of destination, and there to deliver it to the passenger; whether or not such baggage exceed the amount which is allowed to pass free of charge, provided the surplus has been paid for as extra baggage. *Glasco v. New York, &c.*, 36 Barb. 557.

Where one who has charge of cattle is travelling upon a railroad, under a free pass, which contains a stipulation, that, "by accepting or using it, he expressly releases the company in consideration of this pass, and the reduction of the price below the tariff rates, from all liability for injury to said stock," or "for injury to his person, or stock from any cause

whatsoever;" and is injured without any wilful fault or gross negligence of the agents of the company: the corporation will not be held liable to him for personal injury. *Boswell v. Hudson, &c.*, 5 Bosw. 699.

A railway issued excursion tickets at reduced prices, "subject to the conditions contained in the company's time and excursion bills." The bills contained this condition, "Luggage under sixty pounds, free at passenger's own risk." Held, a purchaser of such ticket, who had the means of knowing, but did not in fact know of the condition, could not recover for the loss of his personal luggage (under sixty pounds), though properly addressed, and although he was not allowed to retain it under his personal control. *Stewart v. London, & Hurl. & Colt.* 134.

The clause, "Delivery of baggage to railroads and steamboats to be made to the baggage agent thereof, liability limited to \$100, except by special agreement," &c., applies only to deliveries to railroads and steamboats, and to liability as insurers, not for actual negligence. *Prentice v. Decker*, 49 Barb. 21.

A "free ticket" by a railroad to a passenger containing the following writing, "The person accepting this free ticket, in consideration thereof, assumes all risk of accident and expressly agrees that the company shall not be liable, under any circumstances, whether of the negligence of their agents or otherwise, for any injury to the person or property," does not cover the loss of baggage occasioned by wilful default or tort. *Mobile v. Hopkins*, 41 Ala. 486.

Where a check for baggage — which exceeded \$100 in value — had stamped on one side, "In consideration of free carriage, its value is agreed to be limited to \$100," and on the other, "I. & C. R. R. 583, Indianapolis and Shelbyville," which words and figures the passenger could, but did not read, and the baggage was lost; held, not to excuse a loss resulting from want of care. *Indianapolis v. Cox*, 29 Ind. 360. See *Harrison v. London*, 2 B. & S. 122.

prove the contents of his trunk, and the value of the baggage taken from it; that, *from the necessity of the case*, the owner of a trunk, having first otherwise proved its delivery to the carrier and its loss, or the loss of articles stolen from it, is a competent witness in a suit brought by him against a common carrier for its loss, to prove the contents of the trunk, and their value. So also the wife of the owner.¹ But this rule will not be extended further than to the proof of such articles as are commonly carried in a travelling trunk.² Nor to the value of the articles in which the baggage is packed, or of other articles, the value of which may be established from description.³ In an action against a common carrier for the value of a trunk and contents, shipped but never delivered, the testimony of one, who saw the trunk packed six or eight weeks before the shipment, is admissible, to show the contents and their value at the time of shipment, although the lapse of time would weaken its force.⁴

§ 30. As in other cases, a party cannot recover for a loss of this description, where he has himself been in fault, or deviated from the ordinary course of dealing, in reference to the article lost, or himself taken special charge of it; more especially, if the property is rather of the nature of *freight* than *baggage*. Thus the plaintiff received a parcel from A, to book for London, at the office of the defendants, common carriers; but, instead thereof, put the parcel into his bag, intending to take it to London himself, and took a place in the defendants' coach. The bag being lost; held, the plaintiff could not recover.⁵ So, where the plaintiff sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not; and the goods were lost without any gross negligence in the carrier, or any conversion by him: held, the carrier was not liable.⁶ So, where an overcoat belonging to a passenger was not delivered to the defendants, a railroad company, but the passenger, having placed it on his seat, forgot to take it with him when he left, and it was afterwards stolen; held, the defendants were not liable.⁷ So, where an emigrant passenger in the defendants' ship, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth with ropes; and during the voyage it was stolen: held, the owners of

¹ Johnson v. Stone, 11 Humph. 419;
Mad River, &c. v. Fulton, 20 Ohio, 318.

² 20 Ohio, 318.

³ Davis v. Michigan, &c., 22 Ill. 278.

⁴ Sugg v. Memphis, 40 Mo. 442.

⁵ Miles v. Cattle, 6 Bing. 743.

⁶ Collins v. Boston, &c., 10 Cush. 506.

⁷ Tower v. Utica, &c., 7 Hill, 47.

the ship were not liable for its value.¹ And, as already stated, the implied obligation of a common carrier to carry the baggage of a passenger does not extend beyond ordinary baggage, or such as a traveller usually carries with him for his personal convenience; nor does it include more money than a reasonable amount to pay travelling expenses.² Nor does the term "baggage" include *articles of merchandise*, not intended for personal use, which are in the nature of *baggage* or *freight*, but not paid for as such; such as "thirty-eight papers of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe-nails."³ The articles of property treated as baggage, under the decisions of different courts, are said to be clothing, money for travelling expenses, a few books for reading on the journey, a watch, a lady's jewelry for dressing, &c.⁴ A common carrier who takes charge of a passenger's valise, as baggage, without notice that a large amount of gold is in the valise, is not liable for the loss of the gold, even though purloined by one of his agents.⁵ (a)

§ 31. In reference to the defence, that the injury for which an action is brought occurred by the fault of the plaintiff himself; the general principle, *in pari delicto*, is held not strictly applicable.⁶ It is held, in the case of a railroad, that the law does not require of passengers in cars an exercise, in imminent peril, of all the presence of mind and care of a prudent and careful man; but the circumstances will be left to the jury, to say, from them, whether

¹ Cohen v. Frost, 2 Duer, 335. See M'Kee v. Owen, 15 Mich. 115.

² Whitmore v. Steamboat Caroline, 20 Mis. 513.

³ Collins v. Boston, &c., 10 Cush. 506.

⁴ Doyle v. Kiser, 6 Ind. 242.

⁵ Ibid.

⁶ Saltonstall v. Stockton, Taney, 11.

(a) It is not negligence in a traveller, to go to a hotel in the vicinity of a steamboat landing, and send a servant to the boat for his trunks. The carrier is bound to take care of the trunks for a reasonable time after arriving at the wharf. Nevins v. Bay, &c., 4 Bosw. 225.

The carrier is liable for an overcoat left in a state-room, the door of which was locked by the passenger. Gore v. Norwich, 2 Daly, 254.

So for the loss by theft or robbery of baggage taken in the night from a state-room, which the passenger retained in his own custody; such as a pocket-book and watch; he being guilty of no negligence. Crozier v. Boston, 43 How. Pr. 466.

So for the value of a trunk, containing the wearing apparel of the plaintiff's daughter; and delivered on board the boat on which he was travelling on a

through ticket, and "checked through," with other baggage. Baltimore v. Smith, 23 Md. 402.

If a passenger neglects to take away his baggage within a reasonable time after arriving at the end of the route, but for his own convenience leaves it in charge of the steamboat, they become merely gratuitous bailees, and are not responsible for its loss by fire. So although the arrival is on Sunday, and a statute prohibit secular labor, &c., on the Lord's day. Jones v. Norwich, 50 Barb. 193.

Where a railroad passenger is unable, from lameness, to take away his baggage himself, but makes an arrangement with the baggage-master to retain it until he can send for it; the railroad's liability as common carrier continues until it is so sent for. Curtis v. Avon, 49 Barb. 148.

the party acted rashly and under undue apprehension of danger.¹ And, in an action for an injury occasioned by the negligence of the company's servants, it is not sufficient for the company to show, that the plaintiff was acting, at the time of the injury, in disobedience of a reasonable order for his safety; but it must also appear that such disobedience contributed to the injury.² So it is held that the burden of proof, in an action by a ferry passenger for an injury sustained by him, is upon the defendant, to show want of ordinary care in the plaintiff.³ So a passenger on a stage-coach may, in case of accident arising from the neglect of the carrier, and in the exercise of reasonable discretion, leap from it to save himself, and maintain an action against the carrier for injuries arising from such leap.⁴ So where a passenger, at the time of a collision, is in the baggage-car, with the knowledge of the conductor, he may recover, though he might or would not otherwise have been injured.⁵ But a railroad company is held not liable for running over one walking on the track.⁶ (a)

¹ Galena, &c. v. Yarwood, 17 Ill. 509.
See Pratt v. Ogdensburg, 102 Mass. 557.

² Lawrenceburgh, &c. v. Montgomery, 7 Ind. 474.

³ May v. Hanson, 5 Cal. 360.

⁴ Frink v. Potter, 17 Ill. 406.

⁵ Carroll v. New York, &c., 1 Duer, 571. But see Robertson v. New York, &c., 22 Barb. 91. See, also, Pennsylvania, &c. v. M'Closkey, 23 Penn. 526, 532.

⁶ Brand v. Schenectady, &c., 8 Barb. 368.

(a) A delay probably injurious being shown, it is admissible to show that, before starting, the plaintiff consented to a delay, if necessary. Johnson v. Lightsey, 34 Ala. 169.

See, further, as to the defence of a passenger's own fault, Havens v. Hartford, &c., 28 Conn. 69.

If the agents of a railroad use due care, and the party injured by a collision is guilty of gross negligence, the company is not responsible. Sims v. Macon, &c., 28 Geo. 93.

The negligence of a slave, killed by sitting on the track, was held the negligence of his owner. 28 Geo. 93.

The rule of a railroad, that no passenger shall stand on the platform while the cars are in motion, may be shown by parol. Yonge v. Kinney, 28 Geo. 111.

Riding on the tenders of a public sleigh is such negligence as will bar an action for injury sustained from other vehicles. Spooner v. Brooklyn, &c., 36 Barb. 217.

Where a railroad company provide a platform or other safe means of exit from their cars, at a station, it is the duty of passengers to leave by the way provided, unless it be unsafe, or a justifying neces-

sity exist to escape from peril or injury to life or limb; and it is error to admit evidence to be given to the jury, that persons were in the habit of getting out of the cars on the side opposite the platform. Pennsylvania, &c. v. Zebe, 37 Penn. 420.

A person, who obtrudes himself upon a locomotive or cars, cannot recover if he sustains injury. Moss v. Johnson, 22 Ill. 633.

The plaintiff, having purchased a through ticket, and having stopped at a way station, afterwards got into a caboose car, which was attached to a freight train, and in which passengers frequently rode, and the conductor, after discussion with him, concluded that his ticket allowed him to ride in the train, and suffered him to remain. In a suit for an injury received by an accident to the train, held, he must be conclusively presumed to be lawfully on the train. Also, that the company were estopped to say, that the caboose car was so evidently dangerous that it was negligence on the part of the passenger to ride therein. Edgerton v. New York, &c., 35 Barb. 193, 389. See Barker v. Coffin, 31 Barb. 556; Barker v. N. Y. &c., 24 N. Y. (10 Smith) 599.

If the stoppage of a train is so short,

§ 32. *Ferryman* are common carriers of all property, which they carry in their boats, whether accompanied by passengers or not. And it is held, that passengers on board a ferry-boat, and taking care of their own property, while acting in good faith, may be considered as agents of the ferryman, who will be liable therefor as a common carrier.¹ (a)

¹ *Fisher v. Clisbee*, 12 Ill. 344; *Lewis v. Smith*, 107 Mass. 334. See *Harvey v. Rose*, 26 Ark. 3; *Doran v. East*, 3 Lans.

105; *Compton v. Van Volkenburgh*, 34 N. J. L. 134; p. 549.

that a passenger has only time to go into one car before the train starts, he is not bound to look through the train while it is in motion, but may at once, if there is no seat ready for him to occupy in the car, stand upon the platform; and a statute against such mode of riding will not then protect the company in case of an injury to him. *Willis v. Long, &c.*, 32 Barb. 398.

A passenger, who has refused to pay his fare, may resist an attempt to put him off the car in a manner dangerous to life or limb, and his proper resistance is no excuse for increased violence on the part of the conductor. And where the conductor put a passenger off the front end of a horse-car, while it was in motion, and, in so doing, the passenger resisting, threw him on the ground, where the ice and snow were so banked up that the man rolled under the car and was killed; held, the act of the conductor was unnecessarily violent and dangerous, and the company liable. *Sanford v. Eighth, &c.*, 23 N. Y. (9 Smith) 343.

Where it is not entirely clear, from the evidence, in an action by one injured by a collision, who was at the time riding in a public coach, that the negligence of the driver contributed to the injury; the question should be submitted to a jury. *Brown v. New York, &c.*, 31 Barb. 385.

Where a person purchases a ticket, and takes his passage upon a train, and, after the train starts, gives up his ticket to the conductor; he cannot, at an intermediate station, by virtue of his subsisting contract, leave such train while in the reasonable performance of the contract, and claim a seat upon another train. *Cleveland, &c. v. Bartram*, 11 Ohio, N. S. 457.

A railroad company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains; and payment of fare to its office-agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition. *Ibid.*

An offer to pay the fare to an employee on the train, unauthorized to receive it, is not an offer to the company, and, in such case, does not entitle the person to a place on the freight train, as a passenger. *Ibid.*

(a) A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his property, by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, springs against the chain stretched across the end of the boat, and attached to a hook, insufficient in strength for the purpose for which it is designed, breaks the hook, and throws himself and the wagon overboard, whereby the horse is drowned, and the merchandise in the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred; the proprietors of the ferry are not responsible. *White v. Winnisimmet Co.*, 7 Cush. 155.

The defendants, lessees of a ferry over a river, ran steamboats across, for passengers and goods. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff, having paid the usual fare, led his mare on board at one side of the river, and remained with her, until the steamboat reached the other side. For landing the passengers and animals, the defendants had provided a movable slip, leading from the boat to a landing barge. The slip had a hand-rail, which had been twice, recently, to the defendants' knowledge, broken by the pressure of a horse on landing; and in the hand-rail was an

§ 33. A carrier has a *lien*, or may *detain* goods or baggage, for his hire.¹ And this rule applies to railroads.² (a) And it was formerly held, that this might be done even against the true owner, although the goods were delivered to the carrier by a person who had no right to them.³ But even a statutory lien does not attach

¹ *Skinner v. Upshaw*, 2 Ld. Raym. 752. See *Hutchings v. Western, &c.*, 25 Geo. 61; *Tooker v. Gormer*, 2 Hilt. 71; *Oppenheim v. Russell*, 3 B. & P. 42; *Steamboat, &c. v. Kraft*, 25 Mis. 76; *Langworthy v. New York, &c.*, 2 E. D.

Smith, 195; *Galena, &c. v. Rae*, 18 Ill. 488; *Hale v. Barrett*, 26 Ill. 195.

² *Galena, &c. v. Rae*, 18 Ill. 488. See *Gilson v. Gwinn*, 107 Mass. 126; *Rodgers v. Grothe*, 58 Penn. 414; *Wingard v. Benning*, 39 Cal. 543.

³ *Yorke v. Grenaugh*, 2 Ld. Raym. 866.

iron spike, which appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They, notwithstanding, continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore, but the mare pressed against the rail, the latter gave way, and the iron spike concealed in it injured her severely. Held, the defendants, as ferrymen, were bound to provide proper means for the embarkation and landing of the animals they carried for hire, and, although the mare was under the control and management of the plaintiff, they were liable for the injury. *Willingoughby v. Horridge*, 16 Eng. L. & Eq. 487.

A ferry is liable for injury caused by letting down the chain securing the passage-way from the boat to the bridge, before the boat is properly made fast. *Ferris v. Union*, 36 N. Y. 312.

If a ferry at the very threshold of its gate places a log against which its passengers would be in danger of stumbling in the dark, it is liable for not placing a light on the premises. *Osborn v. Union*, 53 Barb. 629.

The owner of a young horse, timid and easily frightened, has a right to take him on a ferry boat; and, if he exercises proper care in the management of the horse, the company is liable for any injury or loss resulting from its negligence or that of its employees. *Clark v. Union*, 35 N. Y. 485.

Ferry companies are bound to furnish reasonably appropriate, safe, and convenient means for the exit of teams from their boats, and are bound to exercise the utmost skill in the provision and application of such means; but they are not bound to adopt and use a new and improved method, because safer and better than the methods employed by them, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive.

In an action against a ferry company for personal injuries received, as alleged, by their not providing safe exit for the plaintiff with his loaded wagon from their boat, the burden of proof is on the plaintiff, to show that their negligence caused the injury, and that it was not caused by want of reasonable care on his part. The fact that an accident occurred while the plaintiff was using reasonable care will not raise a presumption that they were negligent, though the jury may give it such weight as a fact, and draw such inference from it, as they think reasonable or necessary in view of the whole evidence. *Le Barron v. East Boston*, 11 Allen, 312.

Where a stage company make use of a ferry for hire, as part of their route; the ferry is their agent, and the company are liable for an injury to a stage passenger while the stage is on the boat. *McLean v. Burbank*, 11 Minn. 277.

(a) This right does not deprive the general owner of the right to immediate possession *as against a wrong-doer*. It constitutes no bar to the possession of the property, unless set up by the authority of the carrier. *Ames v. Palmer*, 42 Me. 197.

Several cargoes of coal, delivered by their owner upon the wharf of a railroad, were successively carried over the road, and at the place of destination unladen, assorted, and deposited by the owner's servants in bins on the land of the corporation, adjoining the owner's land, and portions were carried away and delivered to purchasers by the owner, from time to time, until he became insolvent, when the corporation forbade the taking away of any more coal without payment of the unpaid freight and wharfage. Held, the corporation had a lien upon the coal which remained, for the wharfage and freight of all the cargoes. *Lane v. Old Colony, &c.*, 14 Gray, 143.

to a stolen horse.¹ And the more recent doctrine is, that a common carrier, who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner,² not even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.³ So a carrier has no lien for freight upon goods received from a wharfinger, with whom they were deposited, with no authority to forward them.⁴ Nor for back freights.⁵ Nor on property of the United States.⁶ If the bailor or passenger pays the carrier in advance, and the carrier without the assent of the bailor employs another to perform the service, the latter must look to the carrier, and has no lien on the property of the bailor who has paid already. But if the bailor had not paid, the one who did the service would have a lien. It is for the bailor to prove payment in such case, as it will not be presumed.⁷

§ 34. If a common carrier be induced to deliver goods to the consignee by a false and fraudulent promise of the latter, that he will pay the freight as soon as they are received; the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm, and sue the consignee in replevin.⁸ (a)

¹ Gump v. Showatter, 43 Penn. 507.

² Robinson v. Baker, 5 Cush. 137. See Angell on Car. § 363; Fitch v. Newberry, 1 Doug. 1; Van Buskirk v. Purinton, 2 Hall, 561.

³ Stevens v. Boston, &c., 8 Gray, 262.

⁴ Clark v. Lowell, &c., 9 Gray, 231.

⁵ Leonard v. Winslow, 2 Grant, 139.

⁶ Dufolt v. Gorman, 1 Minn. 301.

⁷ Nordemeyer v. Loescher, 1 Hilt. 499.

⁸ Bigelow v. Heaton, 6 Hill, 43.

(a) To the entire view of the subject of *bailment* now completed, we subjoin a brief notice of the *remedies* or *forms of action* pertaining to this liability.

As has been often mentioned in the course of the present work, to maintain trespass for taking and carrying away chattels, the plaintiff must have actual possession, or a right to immediate possession, at the time of the taking. Hence a bailor of chattels cannot maintain trespass against one who unlawfully takes them from the bailee during the bailment; and this rule holds, in case of an attachment of the chattels by an officer, as the property of a third person. *Mugridge v. Eveleth*, 9 Met. 233. See i. 527.

But, under some circumstances, the general owner or bailor may retain a sufficient possessory title, to support an action against one who wrongfully interferes with the property. Thus the owner of cotton is the proper person to bring an action against a warehouseman for failure to discharge his duty, and not a person

who has a special lien on it for money advanced, and who controlled the shipment. *Scott v. Jester*, 8 English, 437.

If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage; the bailor may maintain an action of trespass therefor against him, without a previous demand. *Stanley v. Gaylord*, 1 Cush. 536.

So a father, owning horses and carriages, put them into the possession of his son, to enable him to earn his livelihood, making no stipulation as to the time the son should keep them, and telling him that, whenever he (the father) should be put to any expense on account of them, he should take them away and sell them. The son established a livery-stable accordingly, paying the expenses himself, and taking the profits to his own use, and on one occasion let a horse and carriage to go to a particular place; but the driver drove him to another place,

where they were attached as the son's property, and the officer refused to give them up when demanded by the father. Held, the father had such a right of possession, as entitled him to maintain trover against the officer. *Morgan v. Ide*, 8 Cush. 420. See *Lewis v. Mobley*, 4 Dev. & B. 323.

So where the owner of beds let them for hire at a stipulated price by the month, payable in advance, and the hirer, within the month for which the last payment was made, abandoned the house in which he used the beds, leaving them there, and sending word to the owner that they were ready for him; held, the owner thereby became entitled to immediate possession of the beds, and might maintain trover therefor, before he received notice of the abandonment. *Hardy v. Reed*, 6 Cush. 252.

If the time is not fixed by agreement, or by the nature of the object to be accomplished, a bailee must return the property whenever called upon, after a reasonable time; and, if a written contract does not specify the time, parol evidence is admissible to determine what time is reasonable. *Cobb v. Wallace*, 5 Cold. 539.

Where a bailor forbids delivery of the property without a written order, delivery to the bailor's wife is unauthorized. *Kowing v. Manly*, 49 N. Y. 193.

Whether a bailee is estopped to deny the bailor's title, see *Maxwell v. Houston*, 67 N. C. 305; *Cook v. Holt*, 48 N. Y. 275; *Barnard v. Kobbe*, 3 Daly, 35; *Ball v. Liney*, 48 N. Y. 6.

As to actions by a bailee, see *Wooley v. Edson*, 36 Vt. 214.

By a carrier, see *Merrick v. Brainard*, 38 Barb. 574.

The bailee of a sheriff, to whom the property of a third person is delivered, upon a contract to return it at the sale-day, has such a property in the thing bailed as will authorize him to sue a wrong-doer, for depriving him of the possession. (See chap. 30.) *Cox v. Easeley*, 11 Ala. 362.

But a bailee, who holds property for the purpose of performing work upon it for a compensation, by which the property is not to be deprived of its original character, has only a special property in it; and if, after the completion of his work, he delivers it to a common carrier for the general owner, he loses his special property, and can maintain no action against the carrier for the loss of the goods. *Morse v. Androscoggin, &c.*, 39 Me. 285.

The bailee of personal property may,

in an action against a stranger, recover damages commensurate with the injury done to the property, by such stranger, while in the bailee's possession. *Little v. Fossett*, 34 Me. 545.

Where a wharfinger or warehouseman insures goods deposited with him, he is entitled, in case of loss, to recover the full value of the goods destroyed; but he is liable to the true owners for the excess of the money received beyond the amount of his own charges. *Waters v. Monarch, &c.*, 34 Eng. L. & Eq. 116.

So, in trover by a bailee against the real owner, the plaintiff can recover the amount of his special property only; but, if the action is against a stranger, the full value of the article, holding the balance, beyond his special interest, in trust for the general owner, to whom he is responsible. *Benjamin v. Stremple*, 18 Ill. 466.

A bailee may, under some circumstances, not have such possession, as will give him the control of the property in reference to third persons. Thus, where the defendant hired a steamboat for an excursion to Richmond, the owner's captain navigating the vessel; held, the defendant had not such a possession, as to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board. *Dean v. Hogg*, 10 Bing. 345.

The bailor may recover the value of the property, though not the owner. *Casey v. Suter*, Am. Law Reg., Jan. 1873, p. 52; 36 Md.

So the bailee. *Woodman v. Nottingham*, 49 N. H. 387. See *Bliss v. Schaub*, 48 Barb. 339.

In an action by a pledgee against a sheriff, for a conversion of goods pledged, the sheriff, who has lawfully seized them under a lawful writ, will be treated as in privity with the pledgor, and held only for the plaintiff's special interest in the goods; but, in any other event, he will be treated as a stranger, and held for their full value. *Treadwell v. Davis*, 34 Cal. 601.

In trover by a bailee, only the value of his interest will be recovered, where there has been no conversion, and the property was returned before commencement of suit. *Eldridge v. Adams*, 54 Barb. 417.

The plaintiff delivered to A certain stock for clock-making, watches, watch materials, jewelry, &c., under an agreement in writing, that A should manufacture, repair, and put in order the property, and that he might sell it, or exchange it for certain other specified descriptions of

property; and that the plaintiff would take back all the property, if requested, after three years, and before, if the parties could agree; or that, if the plaintiff should request, the whole property should be his at all times, and, if A should exchange the property for any description of property not authorized by the agreement, or should use any of the property, he should charge such property to himself, and become responsible to pay for the same; and that A would manufacture, repair, and dispose of the property as stipulated; and that, having received pay for so doing, all the profit "should belong, together with the property, to the plaintiff." A received property under the contract, and was working and trading with the same; and, while he was so doing, the property was attached by the defendant as belonging to A. Held, the plaintiff had a right to immediate possession, which would sustain an action of trover. *Batchelder v. Warren*, 19 Vt. 371.

The plaintiff leased his only cow for one year, and, during that time, the defendant, a deputy sheriff, levied upon the cow by virtue of an execution against the plaintiff, but left her in the possession of the lessee until the expiration of the year, and then drove her away and sold her. Held, although the plaintiff might not have been able to sustain trespass for the levy within the year, yet the cow, after the determination of the bailment, was constructively in his possession, and the driving away of the cow was a fresh trespass, for which the plaintiff might maintain the action. *Keyes v. Howe*, 18 Vt. 411.

An action cannot be sustained against a mere *depository* of money, unless his situation has been changed from that of a depository to that of a debtor, either by a wrongful refusal to pay the money upon proper request, or by a wrongful appropriation of it. *Jackman v. Partridge*, 21 Vt. 558; *Phelps v. Bostwick*, 22 Barb. 314; *Montgomery v. Evans*, 8 Geo. 178.

A sends his horse, for the night, to B, who turns it out after dark into his pasture-field, adjoining to and separated from a field of C by a fence, which C was bound to repair. The horse, from the bad state of the fence, falls from one field into the other, and is killed. Held, that B, though a gratuitous bailee, might maintain an action against C, and recover the value of the horse. *Rooth v. Wilson*, 1 B. & Ald. 59.

The owner of a chattel may bring an action for an injury done to it notwithstanding a settlement between the owner and the bailee, accompanied by an agreement that the latter may bring a suit in the name of the former, but at his own risk and expense and for his own benefit. Such agreement is not void for champerty. *Rindge v. Coleraine*, 11 Gray, 157.

In replevin against a carrier, who defends upon the ground of non-payment of freight; this defence may be met by showing damage to the goods exceeding the amount of freight. *Dyer v. Grand*, 42 Vt. 441.

A carrier, having a claim for advances and freight, has an insurable interest to the extent of the fair value of the property at the place of loss. *Savage v. Corn*, 36 N. Y. 655.

CHAPTER XLVII.

LANDLORD AND TENANT.

- | | |
|--|--|
| 1. <i>Lease and mortgage</i> ; torts relating to. | 8. By third person against landlord or tenant. |
| 2. Actions by landlord and tenant against third persons. | 9. Forms of action by landlord and tenant against third persons — <i>trespass and case</i> . |
| 3 <i>e.</i> By landlord against tenant. | |
| 4. By tenant against landlord. | |

§ 1. It remains to give a brief view of the wrongs which may be committed in connection with two other private relations; viz., that of *landlord and tenant*, and that of *mortgagor and mortgagee*. Both these relations grow for the most part out of *written and sealed contracts or conveyances*; and the law pertaining to them is therefore for the most part foreign from the general subject of the present work, and requires only a proportionally general and comprehensive statement.

§ 2. A tenant and landlord may both maintain actions at the same time for injuries done to the estate; the former an action of trespass for the interruption of his possession and diminution of his profits; the latter an action on the case for the permanent injury to his property.¹ (a) Thus, where part of a lot of land under lease is taken by a city to widen a street, the lease is not thereby extinguished, nor the lessee discharged from the rent. But the lessor and lessee are each entitled to recover damages.²

§ 3. But where the lessee of a store is prohibited, under certain penalties, by the lease, from making any alterations in the store

¹ *George v. Fisk*, 32 N. H. 32; *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, *Ib.* 523; *Okeson v. Patter-*

son, 29 Penn. 22; *Gilbert v. Kennedy*, 22 Mich. 17.

² *Parks v. Boston*, 15 Pick. 198.

(a) In an action by a tenant for injuries to his possession, he may recover the necessary expense of restoring the building to a condition as beneficial as its former one; but not, in general, a sum exceeding the value of his term, taking into consideration the rent reserved. But if he is bound to repair, and restore the premises in as good condition as when leased, he may recover a sum sufficient for this purpose. *Walter v. Post*, 4 Abb. Pr. 382.

An action for quarrying and removing

stone, soil, &c., from the bed of a turnpike road, for the purpose of repairing the road, may be maintained by the owners of the reversion in fee of the land upon which the road is built; but for the injury to the possession, occasioned by placing quarried stone upon land adjacent to the road, and afterwards removing the same, the action must be by the tenant in possession of the land, and the (Kentucky) act of 1854 does not apply. *Kelly v. Donahoe*, 2 Met. (Ky.) 482.

without consent of the lessor, and, subsequently to the execution of the lease, the street is widened by the city; the city is not responsible to the lessee for any damage occasioned by a delay, on the part of the lessor, to give his consent to the alterations rendered necessary by the widening of the street.¹ And, in an action by the lessee against the city, evidence that his sales were less during the time when the street, as widened, was being fitted for use, than in the corresponding season of the next year after the alteration had been completed, is not admissible, unless connected with other evidence, that the diminution of business was occasioned by the operation of widening the street.² And a city or town is not responsible for the inconvenience and loss of business occasioned to the abutters on a street, by incumbrances and obstructions placed in the street for the purpose of repairing it, or by opening a common sewer in the street.³

§ 3 *a*. A rented the premises in question, and sold his interest to the plaintiff, the agent of the owners recognizing the plaintiff as their tenant, previous to the time when the defendant entered. Held, the plaintiff was entitled to possession at that time, and if the defendant, while in possession, rendered the premises untenable, he was entitled to recover in an action of trespass what it would cost to repair.⁴

§ 3 *b*. The reversioner of a leased house and land may maintain an action to recover damages for breaking and entering the premises, removing a blind, and breaking a pane of glass in a window.⁵

§ 3 *c*. If a lessee for years of a farm and stock sells part of the stock contrary to the terms of the lease, the purchaser, after the termination of the lease by agreement of the parties thereto, though within the term named therein, is liable to the lessor in trover for the stock so sold.⁶

§ 3 *d*. A tenant at will, after the determination of his tenancy, by a conveyance from the owner of the premises, cannot maintain an action of tort for breaking and entering his close, against the purchaser, for entering, and removing his furniture, and ejecting his family therefrom, nor can he inquire into the consideration of the deed of conveyance.⁷

§ 3 *e*. One who carries on a farm under a lease providing that

¹ Brooks v. Boston, 19 Pick. 174.

² Ibid.

³ Ibid.

⁴ Burt v. Warne, 31 Mis. 296.

⁵ Cushing v. Kenfield, 5 Allen, 307.

⁶ Billings v. Tucker, 6 Gray, 368.

⁷ Curtis v. Galvin, 1 Allen, 215.

the parties, at the expiration of the lease, are to divide all increase in the stock kept on the farm, is liable to his lessor in trover, if he sell creatures raised on the farm as his own.¹

§ 4. A tenant may maintain trespass *qu. claus.* against the landlord for any interference with the leased premises in violation of the lease. Thus a tenant from year to year, being desirous of letting his house for a quarter, quits and leaves it locked up, with authority to his landlord to let it during his absence, and for that purpose leaves the key with a neighbor. An opportunity of letting offers, but, the person who has the key having absconded, the landlord enters, by placing a ladder against the house, and raising the first floor window, and, after showing the house, leaves it in the same state as before. The house is afterwards broken open by persons unknown, and some of the tenant's furniture and wearing apparel is stolen. Trespass is brought against the landlord for breaking and entering the house, and leaving it insecure, *per quod* the tenant's furniture and wearing apparel were stolen. Held, a plea of leave and license was no answer to the action.² So a tenant at will, whose estate has not been legally determined, may maintain trespass *qu. claus.* against his landlord, for entering and cutting off a pump upon the premises.³ So if a lease be made, with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but, if it be not properly pursued, the lessee may maintain trespass both against the lessor and his assignee.⁴ So under a statute of *forcible entry*, &c., if a tenant at will of a dwelling-house hold over his term, and thereupon, after due notice to quit, the landlord forcibly enter and eject him, his family, and effects from the house; the entry is held unlawful, and the tenant may recover in trespass *qu. claus.*, though he had agreed to leave by a certain day, and that, if he did not leave, the landlord might put out him and his effects in any way he chose.⁵ So a lessee, stipulating to pay and deliver one-third of the crop for rent, may maintain trespass against his landlord for entering and taking it.⁶ So an action lies for detaining goods taken, under a distress for rent, after a sufficient tender made before impounding.⁷ So where one has rented a place to another to make a crop, in which they are to go halves,

¹ Turner v. Waldo, 40 Vt. 51.

² Ancaster v. Milling, 2 Dowl. & Ry.

714.

³ Dickinson v. Goodspeed, 8 Cush. 119.

⁴ Warren v. Arthur, 2 Mod. 317.

⁵ Dustin v. Cowdry, 23 Vt. 631. See

Mussey v. Scott, 32 Vt. 82.

⁶ Blake v. Coats, 3 Greene (Iowa), 548.

⁷ Loring v. Warburton, 1 Ell. Bl. & Ell. 507.

the owner furnishing a horse; this is a *tenancy*, and the tenant may bring trespass against his landlord for forcibly entering and breaking his close.¹ (a)

§ 4 a. Where the defendant let to the plaintiff the ground-floor of a building, on the upper floor of which was a water-closet, open to all the tenants; and the closet became obstructed by rubbish thrown in, overflowed, and injured the plaintiff's goods: held, the defendant was liable.²

§ 5. But where a tenant at will of a house remains in possession, after refusing or neglecting to pay the rent that is due, and after the landlord has given him in writing the legal notice to quit; he cannot maintain trespass against the landlord for entering the house with force, and taking away the windows and inside doors thereof.³ Nor can such action be maintained, where, a tenant having omitted to deliver up possession when his term had expired, after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained.⁴ And, in general, an action of tort for breaking and entering the plaintiff's close does not lie in favor of a tenant by sufferance against his landlord.⁵

§ 5 a. In an action by a servant of lessees against the owners of the building, for injuries occasioned by the negligence of a servant in managing an engine which moved an elevator for goods; it is immaterial whether the owners knew that it was incident to the use of the elevator that a man should go up and down with the goods; nor is it necessary to show any privity of contract between the servant and owners; and the rule that a servant cannot recover of the master for an injury inflicted by a fellow-servant is not applicable to such a case. Evidence is inadmissible, that the elevator was

¹ Hatchell v. Kimbrough, 4 Jones, 163.

² Marshall v. Cohen, 44 Geo. 489.

³ Meader v. Stone, 7 Met. 147.

⁴ Turner v. Meymott, 7 Moore, 574;

1 Bing. 158.

⁵ Moore v. Mason, 1 Allen, 406.

(a) Landlord and tenant are tenants in common of crops raised on shares, until a division is made. The tenant has a right, after he has quitted the possession, to a reasonable ingress upon the land, to remove his goods and utensils. Trespass does not lie against him by the landlord, though he carries away the crops of which they are co-tenants. *Daniels v. Brown*, 34 N. H. 454.

The right to enter for this purpose is derived from a license in law; and, if the right is abused by a resort to violence to

effect the object, the tenant becomes a trespasser *ab initio*, and liable not only for the entry, but for the landlord's share of the crop carried away. *Ibid.*

The damages for the crops must be limited to the value of the landlord's share. *Ibid.*

A tenant in common, who takes possession of the common property which has been leased by his cotenant, is not liable to the lessee for such possession. *Hoopes v. Meyer*, 1 Nev. 433.

not constructed for raising and lowering men ; or of a custom in another store, as to the use of another elevator worked by the same engine ; or a custom in that store for men to go up and down on the elevator, and that the engineer had been up and down ; or whether the party who made the contract would have made a different contract if it had been proposed to him.¹

§ 6. As we have seen, the landlord may be sued in *case*. But where a tenant for a year brings an action on the case against his landlord, during the term, for obstructing lights ; damages can only be given for the time before commencement of the suit, and not for the whole term.² And a tenant cannot recover damages from his landlord, caused by a nuisance on the demised premises, unless he alleges and proves that the defendant is liable on some contract, or that the nuisance arises from some act with which he is connected.³

§ 7. A lessor is not liable, either as partner, principal, or master, for the torts of the lessee or his servants.⁴ And, on the other hand, a tenant is not liable in trespass to his sub-tenant for an interference by the landlord with the possession of such sub-tenant. The landlord alone is liable.⁵

§ 8. The question may arise, whether the landlord or the tenant is responsible to a third person for any act or neglect connected with the leased premises. Thus, where a town is compelled to pay damages for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellar-way constructed in the sidewalk, and leading to a building adjoining thereto, in the occupation of a tenant ; the occupant and not the owner is liable to the town for such damages. But if there was an express agreement between the landlord and tenant, that the former should keep the premises in repair, then, to avoid circuity of action, the landlord would be liable in the first instance.⁶ And an action for damage done to the plaintiff's house, by water falling from the defendant's eaves, they being out of repair, will lie against the landlord, if it be not shown that the tenant was bound to repair.⁷ So case lies against a landlord, who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen.⁸ So where a defendant, in an action for damages occasioned by blasting, had

¹ *Stewart v. Harvard College*, 12 Allen, 68.

² *Blunt v. McCormick*, 3 Denio, 283.

³ *Vai v. Weld*, 17 Mis. 232.

⁴ *Norton v. Wiswall*, 26 Barb. 618.

⁵ *Luckey v. Frantzkee*, 1 E. D. Smith, 47.

⁶ *Lowell v. Spaulding*, 4 Cush. 277.

⁷ *Bellows v. Sackett*, 15 Barb. 96.

⁸ *Leslie v. Pounds*, 4 Taunt. 649.

rented his quarries, but was present on several occasions, and by his conduct adopted the acts of his tenants, assumed the responsibility of the acts complained of, and defied legal proceedings; the injuries cannot be held to be the acts of the tenants exclusively.¹ So the owner of a building leased in several tenements, who is bound to make all necessary repairs, and has control of the passages and doors for that purpose, and who keeps the keys, and opens and closes the doors, of portions of the building, at times fixed by the occupants, is liable for injuries caused by defects in the building, or by the falling of snow and ice therefrom.² So in case of the erection of a barn or stable upon the defendant's land, adjoining the plaintiff's dwelling-house, and allowing manure and filthy water to accumulate and stand in the cellar: if the defendant constructed and adapted the barn, so that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house; the defendant is liable for the nuisance thus caused by his lessees. But if such use of the barn proves a nuisance, by reason of water in the cellar, and that is a special, unusual circumstance, the owner is not liable, unless he knew, or had reason to believe, when he let the barn, that the use of it in the ordinary way would prove a nuisance.³ (a)

¹ *Scott v. Bay*, 3 Md. 431.

³ *Pickard v. Collins*, 23 Barb. 444.

² *Kirby v. Boylston, &c.*, 14 Gray, 249.

(a) In a late case it is held, that the owner of the freehold is liable for injuries resulting from the condition of the freehold itself, caused by his own negligence, whether in his actual occupation or not. If the injury result from the negligence of the tenant, the tenant is liable. Both landlord and tenant may be liable for the same injury. *Eakin v. Brown*, 1 E. D. Smith, 36.

As between different tenants under a common landlord, the question of liability for injuries from the condition of the premises is always one of negligence in the use of the premises. This negligence may consist in the careless use of a well-constructed apparatus, or in the use of apparatus which the tenant had reason to know was unfit for use. *Ibid.*

The tenant of a part of a building, not guilty of negligence or malfeasance, is not liable to a tenant of another portion of the same building for damages resulting from the defective construction of the premises, or from the insufficiency of a Croton water fixture. *Ibid.* See *Hibbard v. Foster*, 24 Vt. 542.

In an action against landlord and tenants, to recover damages for falling through a coal-scuttle in the sidewalk in front of the house, evidence that the landlord received rent, and that the tenants could have used the scuttle, renders them both liable, without showing that the scuttle was an appurtenance to the premises, or that the tenants actually used it. *Irvin v. Fowler*, 5 Rob. (N. Y.) 482.

The defendant was owner, and had control of the roof, of a building, all the rooms of which were occupied by tenants. The roof was so constructed, that snow and ice collecting upon it from natural causes would probably and naturally fall into the street. Held, the defendant was liable for injury to a passenger without fault, caused by such fall. *Shipley v. Fifty*, 106 Mass. 194.

A landlord levied a distress upon property of his tenant, for the sale of which a petition had previously been filed by creditors of the tenant. Receivers were afterwards appointed to take possession of and sell the property, and an agreement was then entered into between the land-

§ 9. A landlord, not having the right of possession, cannot maintain trespass, which is an injury to the possession. Thus a lessor cannot maintain trespass against a sub-tenant at will of the lessee, for taking down and carrying away a house, erected by him on the demised premises, during the lease.¹ (a) Nor against a lessee who holds over his term without an actual entry.² So, where A leased to a school committee a school-house on his land to keep a school for three months; and, on the last day of the school, the committee entered and carried away a table, benches, &c.: held, A had no possession, actual or constructive, which could enable him to maintain an action of trespass.³

§ 10. It has been held, that case does not lie, by a lessor seised in fee, against a lessee at will, for negligently keeping his fire in a field, whereby the stable leased to him was burned.⁴ But the later doctrine is, that trespass on the case may be maintained by the

¹ Tobey v. Webster, 3 Johns. 468; Campbell v. Arnold, 1 Ib. 511; Stuyvesant v. Tompkins, 9 Ib. 61; Wickham v. Freeman, 12 Ib. 183; Reynolds v. Williams, 1 Tex. 311.

² Trevillian v. Andrew, 5 Mod. 384. But see Millhouse v. Patrick, 6 Rich. 350.

³ Brooks v. Stinson, Busbee, Law, 72.

⁴ Pantam v. Isham, 1 Salk. 19.

lord and the creditors, by which the former forbore to sell under his distress, in consideration of receiving his rent out of the proceeds of the creditors' sale, in preference to other liens, and therefore permitted the receivers to take possession. This agreement was assented to by the receivers, who took possession on the day of sale. The landlord afterward levied a second distress. Held, in an action of trespass by a mortgagee of the tenant, who had not been a party to the petition for sale, that no justifiable cause was shown for the abandonment of the first distress; that the property was not *in custodia legis*, when the first distress was levied; and that the second distress was therefore invalid, as against the plaintiff. Everett v. Neff, 28 Md. 176.

An owner of land, who constructs a vault under and opening into the highway in front of his premises, and covered only by a movable grating, without fastenings, is liable for injuries sustained by a passerby who falls into the opening, although the premises were at the time leased to a tenant, who left the opening uncovered. Anderson v. Dickie, 1 Rob (N. Y.) 238.

Where the upper stories of a store are verbally leased by the owners, who occupy the lower stories, with an understanding that the lessee is to have the right of using one of the entrances leading to the leased premises, in which there is

a trap-door, belonging to the owners, and used for hoisting goods, the owners are liable to a person having lawful occasion to pass to the upper rooms, who, while using due care, is injured by reason of their failure to take precautions against accident. As where an entrance, in front of a flight of stairs leading to the upper stories is so constructed and kept open, as to appear to be a proper entrance for persons having occasion to ascend the stairs, and one so entering lawfully, and with due care, is injured by falling through a trap-door in the passage, which has carelessly been left open by the owners' servants. Elliott v. Pray, 10 Allen, 378.

(a) A tenant, under a written lease, held over after its expiration. Held, that after his lease expired he was a tenant at sufferance. Russell v. Fabyan, 34 N. H. 218.

A tenant at sufferance, until the landlord enters upon him, is not liable to an action of trespass; but he is still answerable for any damages growing out of his interference with the property, as a dis-seisor would be, who is responsible for any damages occasioned by his conduct, whether wilful or negligent. Ibid.

An action on the case is the proper remedy for any such injury; and if the tenant has taken a lease and bond of indemnity from a third person, the latter is liable with him in such action. Ibid.

owner of the fee against a tenant at will, for acts prejudicial to the inheritance.¹ And, in general, a reversioner in fee can maintain an action against his tenant during the term, for an injury to the freehold.² And it has been held, that a lessee is liable even for the act of his servant. As where the clerk of the lessee of a store wantonly fired a can of powder, and blew up the store.³ So a lessor may sue in case for injury to his reversion, though the injury is the working a mine, contrary to the terms of the lessee's covenant, and for the committing of which an action on the covenant would lie.⁴ So it is held, that an action on the case will lie by a lessee for years against his under-lessee, for so negligently keeping his fire that the premises were burned down; because such lessee is liable to the first lessor.⁵

§ 11. In regard to actions by landlords against third persons; to entitle a reversioner to maintain an action for a nuisance, whereby his reversion is injured, the injury must be of such a permanent nature as to affect the reversion. Thus the landlord of a house cannot maintain an action for the noise made by the defendant's hammering in adjoining premises during the tenancy, although less rent was paid by the tenant in consequence of such noise.⁶ So making fires and causing smoke to issue from a chimney, the erection of the chimney itself not being a nuisance, but only the use made of it, is not ground for an action by the reversioner of adjoining premises, although his tenants have given notice to quit in consequence, and the premises would sell for less if the nuisance were continued.⁷ So a reversioner of land leased cannot maintain an action on the case against a stranger, for merely entering on his land, though in the exercise of an alleged right of way.⁸ Nor can a lessor at will maintain an action against a third person, for entering on the land, demanding rent of the lessee, and leasing the land to him; no actual damage being done thereby to the reversion.⁹ But where the plaintiff demised a cottage without exception of mines; it was held, that he might sue in case for an injury occasioned to the cottage by a stranger who had excavated coal, though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house

¹ *Files v. Magoun*, 41 Me. 104.

² *Ray v. Ayers*, 5 Duer, 494.

³ *Mason v. Stiles*, 21 Mis. 374.

⁴ *Marker v. Kenrick*, 14 Eng. L. & Eq. 320.

⁵ *Cudlip v. Rundall*, 4 Mod. 9; *Hicks v. Downing*, 1 Ld. Raym. 99.

⁶ *Mumford v. Oxford, &c.*, 36 Eng. L. & Eq. 580.

⁷ *Simpson v. Savage*, 37 Ib. 374.

⁸ *Baxter v. Taylor*, 4 B. & Ad. 72; 1 Nev. & M. 11.

⁹ *French v. Fuller*, 23 Pick. 104.

in the occupation of the plaintiff.¹ So the building a roof, with eaves which discharge rain-water by a spout into adjoining leased premises, is an injury for which the landlord of such premises may recover, if there is a damage to the reversion.² So, in case for obstructing the plaintiff's mills, the declaration alleged, that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had, therefore, been constrained to make a reduction in the rents. Held, a sufficient cause of action, and that a recovery would be a bar to any action by the tenants for the same obstruction.³

§ 12. Declaration in case, alleging that the plaintiff was reversioner of a house, &c., then occupied by his tenant A; that the defendant was in the occupation of a close near to the house, &c., in which was a watercourse; that the defendant, by reason of his possession of the close, ought to have scoured, &c., to prevent the water from being obstructed, and from running out of the watercourse unto, into, and under the house, &c. But the defendant permitted the watercourse to be obstructed, so that the water was penned back, and ran into and damaged the house, to the injury of the plaintiff's reversion. Plea, that a wall, parcel of the plaintiff's premises, was situate near the watercourse, and the defendant's close; and, by reason of the wall's being, through the neglect of A, ruinous, &c., part of the wall, near to the watercourse, fell down, and rubbish, &c., being part of the materials, fell into the watercourse, and the same was thereby choked up; and the water, for a short time, unavoidably was penned back, &c., and ran out, as in the declaration mentioned; that the defendant, in a reasonable time after he had notice that the watercourse was so choked up, &c., and before action brought, cleansed out the same, so that the water flowed as it ought to do. Held, on general demurrer, that the alleged default of the tenant was no answer, the plea not showing that the owners and occupiers of the estate for the time being were bound to repair the wall. Also, that the defendant could not excuse himself, by averring that he repaired as soon as he had notice of the injury, since he became liable when the injury occurred.⁴

§ 13. But a lessor cannot maintain trespass *qu. claus.*, while there is a tenant in possession.⁵ Where real property is in the

¹ Raine v. Alderson, 4 Bing. N. R. 702.

² Tucker v. Newman, 11 Ad. & Ell. 40.

³ Baker v. Sanderson, 3 Pick. 348. See

Tinsman v. Belvidere, 1 Dutch. 255.

⁴ Bell v. Twentyman, 1 Ad. & Ell. N. S. 766.

⁵ Roussin v. Benton, 6 Mis. 592.

possession of a lessee other than a tenant at will, case, and not trespass, is the proper form of action to be brought by the landlord, for an injury by a stranger affecting the inheritance; even where trespass would be the proper remedy, if the landlord were himself in possession.¹ Thus trespass for an injury to timber, during the possession of the lessee for years, cannot be maintained by the landlord against a stranger, although the lessee was restricted from cutting the timber. Otherwise, if the timber is expressly reserved in the lease.² And it is held that the owner of land cannot maintain trespass *qu. claus.* for an injury to premises in possession even of a tenant at will, unless the freehold or some fixture on it is injured.³ So in order to maintain *trover*, it is held that the plaintiff must have the right of possession as well as of property. Therefore where furniture leased with a house, was wrongfully taken in execution by the sheriff; held, the landlord could not maintain *trover* pending the lease.⁴

§ 14. But it has been held that trespass *qu. claus.* lies for the owner of land in the occupation of his tenant at will, where the injury affects the permanent value of the property; as the cutting down of trees, destruction of buildings, &c.⁵ And where the owner of a mill lets it to one who is to receive part of the tolls, the owner himself must sue for trespass.⁶ So where the owner of a building leases at will the rooms therein, though they constitute the chief part of the building, he still retains such possession as will maintain trespass for the destruction of the building, or any injury which renders it untenable.⁷

¹ Lienow v. Ritchie, 8 Pick. 235.

² Greber v. Kleckner, 2 Barr, 289.

³ Lyford v. Toothaker, 39 Me. 28.

⁴ Gordon v. Harper, 7 T. R. 9. See Bigelow v. Huntley, 8 Vt. 151.

⁵ Starr v. Jackson, 11 Mass. 519.

⁶ Wilson v. Crosby, Wright, 288.

⁷ Curtiss v. Hoyt, 19 Conn. 154.

CHAPTER XLVIII.

MORTGAGE.

§ 1. WITH reference to torts in connection with the relation of *mortgagor and mortgagee*; it has been held that a mortgagee cannot maintain an action for waste against the mortgagor, at least until after the forfeiture of the mortgage.¹ So the treble damages, provided for by the Massachusetts Revised Statutes, c. 105, § 9, where a tenant in possession of land, for the recovery of which an action is pending against him, commits waste thereon during the pendency of the action, can only be recovered in the manner provided by the statute, and cannot be made an item of charge by mortgagor against mortgagee, in an account stated between them by a master in chancery, or on a bill in equity to redeem.² But a mortgagee may maintain an action on the case against the mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for sale of the premises, where the mortgagor is insolvent, and the premises are a slender security for the debt.³ And it is held that an action on the case will lie, by the holder of a mortgage on lands, against the mortgagor or the purchaser from him of the equity of redemption, for acts of waste, committed with a knowledge that the value of the security will be injured thereby, the premises being a scanty security for the debt. As where the defendant, who had purchased under the mortgagor, took away fences, and cut down and carried away valuable timber, with a knowledge of the existence of the mortgage, and the insolvency of the mortgagor. Nor is it necessary to show that the primary motive of the defendant was to injure the plaintiff's security, if done with a full knowledge of the circumstances, although primarily with a view to his own emolument.⁴

§ 2. After sale of mortgaged premises under decree and execution, the mortgagor in possession will be *restrained* from com-

¹ Peterson v. Clark, 15 Johns. 205.

² Boston Iron Co. v. King, 2 Cush. 400.

³ Southworth v. Van Pelt, 3 Barb. 347.

⁴ Van Pelt v. McGraw, 4 Comst. 110.

mitting waste.¹ And, in general, a mortgagee is entitled to an injunction, to restrain the mortgagor from the commission of waste, by which the mortgage security is in danger of being reduced in value below the amount of the mortgage debt. And the court will not only restrain waste, but will, if the bill be brought for that purpose, proceed and take an account of the waste actually committed, and decree satisfaction therefor; not only against the mortgagor, but also against those not connected with the mortgage title, who have committed waste by license from him, after condition broken, and with full knowledge of the respective rights of the mortgagor and mortgagee.²

§ 3. A mortgagor in possession may maintain trespass *qu. claus.*³ So, in trover, the defendant cannot justify, by showing a mortgage from the plaintiff to a third person.⁴ But where the plaintiff mortgaged personal property, and, before he registered the mortgage, which by law was necessary to pass the title, the property was sold on execution against the mortgagee; held, the plaintiff could not maintain trover against the officer; but, as the property was sold without an order of court, he could have a special action for the injury to his right of property.⁵

§ 4. In regard to the right of action of a mortgagee, a mortgagee has no property in trees cut down by a mortgagor in possession, so as to maintain trover against him.⁶ But a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor, for cutting and carrying to market timber trees standing on the premises.⁷ And the mortgagee of timber lands may maintain trespass or trover against any one who shall cut and carry away the timber, or afterwards convert it to his own use, without authority from such mortgagee, although under a license from the mortgagor given after the mortgage.⁸ So a mortgage of goods vests the general property in the mortgagee, who has the immediate right of possession, unless there is an express stipulation to the contrary, and may maintain trespass against him who wrongfully takes the goods away, although he has not given notice to the mortgagor or person in possession, pursuant to (Mass.) Stat. 1843, c. 72, § 1, of his intention to foreclose the mortgage.⁹ So

¹ *Phoenix v. Clark*, 2 Halst. Ch. 447.

² *Hastings v. Perry*, 20 Vt. 272. See *Johnson v. White*, 11 Barb. 194.

³ *Earle v. Hall*, 2 Met. 353, 356.

⁴ *Gaines v. Briggs*, 4 Eng. 46.

⁵ *Murchison v. White*, 8 Ired. 52.

⁶ *Peterson v. Clark*, 15 Johns. 205.

⁷ *Page v. Robinson*, 10 Cush. 99. See *Harris v. Haynes*, 34 Vt. 220.

⁸ *Frothingham v. M'Kusick*, 11 Shep. 403.

⁹ *Brackett v. Bullard*, 12 Met. 308.

although the trespass be committed before the debt becomes due.¹ So a mortgagee of a building, standing on land of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being occupied at the time of the trespass, and the mortgagee not having taken actual possession.²

§ 5. Where a person in possession of mortgaged premises, claiming under the mortgagor, refuses to yield possession to the mortgagee, upon his entry after condition broken, the mortgagee may maintain trespass against him for mesne profits, although the entry may not have been sufficient under the statute for the purpose of foreclosure.³

§ 5 a. The mortgagee of personal property may bring an action for damages to his reversionary interest, although he has not a right to immediate possession.⁴

§ 6. A stipulation in a mortgage of personal property, that the mortgagor shall remain in possession until breach of condition, is personal to the mortgagor, and cannot be assigned or transferred. The mortgagee may bring trover before breach of condition, against a purchaser from the mortgagor.⁵

§ 7. If, after any default in payment of notes, maturing at different dates, to secure which a mortgage has been given, the mortgagor mortgage the goods to a third person, with notice; such third person, if he take and convert the goods to his own use, is liable for them in trover to the first mortgagee.⁶ So a person who aids the mortgagor of personal property, in carrying it away and concealing it, is liable to the mortgagee in trover, even though he was ignorant of the mortgage.⁷ So where the mortgagor of goods, of which the mortgagee had the right of immediate possession, by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor; it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had

¹ *Woodruff v. Halsey*, 8 Pick. 333.

² *Ibid.*

³ *Northampton, &c. v. Ames*, 8 Met. 1.

⁴ *Googins v. Gilmore*, 47 Me. 9.

⁵ *Bellune v. Wallace*, 2 Rich. 80.

⁶ *Burton v. Tannehill*, 6 Blackf. 470.

See *Wolff v. Farrell*, 3 Brev. 68; *Coles v. Clarke*, 3 Cush. 399.

⁷ *Flanders v. Colby*, 8 Fost. 34.

no knowledge in fact of the existence of the mortgage.¹ So a purchaser of land gave a promissory note, secured by mortgage thereof, for the purchase-money, and entered into possession; and afterwards, by agreement of parties, reciting the settlement of all accounts with the mortgagor, the note, before payment of any part of it, was given up to be cancelled, and the land was released to the mortgagee. Held, this was no bar to an action of trover by the mortgagee against a purchaser from the mortgagor, before the execution of the agreement, with notice of property attached to the realty.² But where the mortgagor of personal property, in actual possession, makes an illegal sale to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or of any claims upon the property, but those of the seller and purchaser, is not liable to the mortgagee in trover.³ So after a mortgage of goods had been put on record, the mortgagor, who remained in possession, assigned the goods, and aided the assignee in clandestinely removing them out of the State. In trover by the mortgagee against the assignee, and one B, who at the request of the mortgagor carried away a portion of the goods and delivered them to the assignee, it was held, that, if B did not act in concert with the assignee, or with intent to deprive the plaintiff of his property, the mere removal of a portion of the goods from one place to another, at the request of the mortgagor, was not of itself a conversion, because the mortgagor, having rightful possession, might lawfully direct such removal, if it was not done with an intent to injure the mortgagee and deprive him of his property; or, if the mortgagor had such intent and was confederate with the assignee, yet, if B did not know it or assent to it, his act done at the request of the mortgagor would not be a conversion.⁴

§ 7 *a*. It is held that no action will lie by the holder of a mortgage against another for *negligently* injuring the mortgaged premises, by which the plaintiff has lost his security.⁵ But an action on the case will lie against one who, *with intent to defraud the plaintiff*, has destroyed or injured the value of premises upon which he has a mortgage, the mortgage debtor being insolvent or unable to pay, which must be alleged and proved.⁶ As where an assignee of a mortgagee brings an action against a purchaser from the mortgagor,

¹ Coles v. Clarke, 3 Cush. 399.

² Hemenway v. Bassett, 13 Gray, 378.

³ Burditt v. Hunt, 12 Shep. 419.

⁴ Strickland v. Barrett, 20 Pick. 415.

⁵ See Allison v. M'Cune, 15 Ohio, 726.

⁶ Gardner v. Heartt, 3 Denio, 232.

for removing buildings from the premises after they had been advertised for sale under the power in the mortgage, and before the sale.¹

§ 8. A second mortgagee, in possession of mortgaged chattels, though the prior mortgage is unsatisfied, and the legal title is in the first mortgagee, may maintain trespass or trover against a stranger for the wrongful taking of such chattels.² So, if there are two mortgages upon land, neither of the mortgagees having entered, and the mortgagor, without the assent of either of them, cuts timber upon the land, after which the first mortgage is discharged, the second mortgagee may maintain trespass *qu. claus.* for cutting the timber.³ So A mortgaged to B, and then conveyed to C, taking back a mortgage from him for the purchase-money, which he assigned to D. After this, C remaining in possession, another person cut timber upon the land, under a license from him, without the assent of either of the mortgagees, and subsequently the debt due to B was paid. Held, that D, the assignee of the second mortgage, might maintain trespass *qu. claus.* against the party who cut the timber.⁴

§ 8 *a.* The mere possession by the mortgagor of personal property for more than a year after forfeiture of the mortgage, with the assent of the mortgagee, does not enable the former to give a good title in the absence of authority to sell. Nor does it make the mortgagee guilty of that species of negligence or misconduct which should estop him from afterwards asserting his title as against a third person, who voluntarily, but in ignorance of the true title, assists the mortgagee in the wrongful conversion of the property.⁵

§ 9. Where personal property was mortgaged to secure a note payable in six months, it being stipulated in the deed, that, until default in payment of the note, the mortgagor should retain possession; and the next day the property was attached and sold by an officer as the mortgagor's property, without pursuing the provisions of the statute upon the subject: held, case might be maintained by the mortgagee against the officer, before the note became due; and the mortgagee might recover the value of the property, not exceeding the amount of his claim against the mortgagor, with all the damages sustained in the vindication of his rights.⁶

¹ Lane v. Hitchcock, 14 Johns. 213.

See Kennedy v. Hammond, 16 Mis. 341.

² White v. Webb, 15 Conn. 302.

³ Sanders v. Reed, 12 N. H. 558.

⁴ Ibid.

⁵ Dudley v. Hawley, 40 Barb. 397.

⁶ Forbes v. Parker, 16 Pick. 462.

§ 10. Personal property under mortgage, and in the possession of the mortgagee, was attached by a creditor of the mortgagor, and taken into the custody of the officer. The creditor then instituted proceedings against the mortgagor in the district court, upon which he was adjudged a bankrupt, and the attaching officer was appointed his assignee. The property was subsequently sold by the assignee under a license from the district court, and the proceeds distributed among the creditors of the bankrupt; and, upon the petition of the assignee, the mortgage was declared null and void by the district court, as having been made in contravention of the bankrupt law, and ordered to be delivered up to the assignee to be cancelled. In an action of trespass by the mortgagee against the sheriff, for the act of his deputy in attaching the mortgaged property; it was held, that the action might be maintained, but that the defendant might show the subsequent proceedings in mitigation of damages, and thereby reduce them to nominal only.¹

§ 11. Trover or trespass will lie by the mortgagee against the sheriff, and also against the plaintiff in the execution, who causes the seizure and sale of goods as the property of the mortgagor.² So, although the mortgage stipulates that the mortgagor should retain possession until default of payment, but "if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use."³

§ 11 *a*. If a sheriff, who has attached mortgaged property on two writs, has been sued for the value thereof by the mortgagee, and has prevailed in his defence, on the ground that the demand made upon him was limited to property attached on one writ; the judgment in his favor is no bar to a subsequent action to recover the value of the same property, after a new demand; and, in such case, a new demand within twenty days after the rendition of the judgment is within a reasonable time, if it appear that the situation of the defendant has not changed in the mean time.⁴

§ 11 *b*. A mortgagee of personal property cannot sustain an action against an officer who has attached the same on two writs in favor of different plaintiffs against the mortgagor, if his demand

¹ *Perry v. Chandler*, 2 Cush. 237.

² *Sanders v. Vance*, 7 Monr. 209. See
McConeghy v. McCaw, 31 Ala. 447.

³ *Welch v. Whittemore*, 25 Me. 86.

⁴ *Crosby v. Baker*, 6 Allen, 295.

for the payment of the money due to him was expressly limited to a single attachment.¹

§ 11 *c.* The mortgagee of personal property, which has been attached on a writ against the mortgagor, cannot maintain an action against the officer for taking the same, if, in his statement of the debt for which the property is liable to him, delivered in pursuance of Gen. Sts. c. 123, § 63 (of Mass.), he included a sum which was not covered by his mortgage.²

§ 12. A sale of personal property by a mortgagee before foreclosure is held a conversion.³

¹ *Macomber v. Baker*, 3 Allen, 241.

² *Hills v. Farrington*, 3 Allen, 427.

³ *Spaulding v. Barnes*, 4 Gray, 330.

See *Landon v. Emmons*, 97 Mass. 37.

INDEX.

A.

ABANDONMENT, (See DEDICATION.)

- of mill, &c., i. 654.
- contract, i. 31 n.
- count in slander, &c., i. 380.
- mines, i. 499 n.
- trade-marks, i. 728.
- lights, i. 664.

ABATEMENT,

- of nuisance, i. 69 n., 153, 534, 581, 584, 605, 657. (See NUISANCE.)
- action, in case of joint torts, ii. 262.
- in case of repeal of the statute under which it was brought, i. 113.

ABDUCTION OF CHILD, ii. 520. (See PARENT.)

ABRIDGMENT OF WORK,

- copyright in relation to, i. 714.

ABUSE,

- of corporate charter, i. 579.
- legal process, i. 443, 444, 471.
- statutory right, i. 108.
- license, i. 180.

ACCESSION,

- title by, i. 501, 504 n.

ACCIDENT,

- liability for, i. 94 n., 96 and n., 101 and n., 130, 141.
- whether an assault, i. 195, 204.
- discovery by, patent for, i. 687.

ACCOUNT,

- trover for, ii. 60.
- in case of patent, i. 707.
- copyright, i. 723.
- trade-marks, i. 729.
- waste, ii. 60.

ACQUIESCENCE,

- in case of fraud, ii. 82.
- trespass, i. 184.

- ACQUITTAL, (See TORT AND CRIME.)
 in case of malicious prosecution, i. 448, 476.
- ACT, (See STATUTE.)
- ACT OF GOD,
 in case of waste, ii. 93.
 escape, ii. 215.
 carrier, ii. 566.
- ACTION NON DATUR NON DAMNIFICATO*, i. 76.
- ACTION,
 and injury, connection, and distinction, i. 488.
 and criminal prosecution, i. 60 and n.
 locality of, as affected by that of damage, i. 77 n.]
 abatement of, in case of joint torts, ii. 262.
- ACTION ON THE CASE, (See ASSUMPSIT, CASE, COVENANT, DEBT,
 DECEIT, FRAUD, TORT, TRESPASS, TROVER.)
 what title will sustain, i. 525.
 for malicious prosecution, i. 470.
 vexatious distress, i. 102.
 general usefulness of, i. 576.
 a remedy for nuisance, i. 575.
 for false warranty and representation, i. 4.
 injuries to animals, i. 507.
 where trover will not lie, i. 522 n.; ii. 452.
 against an officer, sheriff, &c., (See OFFICER.)
 jailer for an escape, ii. 212 n.
 clerk of court for default, ii. 217.
 for false return of election, ii. 224.
 against corporation for injury by agent, (See CORPORATION, AGENT.)
 municipal corporation, when it lies, ii. 307.
 for seduction, (See SEDUCTION.)
 and trespass, i. 92 and n., 96, 107 and n., 121, 212; ii. 120 n., 407, 471,
 499, 518, 612.
 as a statute remedy, i. 108.
 against factor, broker, &c., ii. 450.
 master, by servant who has paid judgment recovered for a trespass
 by him, ii. 472.
 by apprentice for non-performance of indentures, ii. 473.
 for waste, ii. 96.
 by landlord, (See LANDLORD.)
 mortgagee, (See MORTGAGE.)
 tenant, (See LANDLORD.)
 in the nature of deceit, i. 4 and n.
- ACTIONABLE WORDS, (See LIBEL.)
- ACTOR,
 action by, for conspiracy to hiss, ii. 247.
- ACTUAL POSSESSION,
 what, i. 549.
- ADMINISTRATOR,
 slander, &c., of, i. 304.

ADMINISTRATOR, — *continued.*

- action for malicious prosecution against, i. 438 n.
- cannot bring an action for seduction of daughter of deceased, ii. 517.
- trover by, ii. 65.
- assignment of patent by, i. 702.
- conversion by, ii. 40.

ADMISSIONS

- and declarations, evidence of, in slander, i. 428. (See **LIBEL**, &c.)
in malicious prosecution, i. 457.
- by pleadings in case of master and servant, ii. 412.
- and declarations, in case of fraud, ii. 82.

ADOPTION,

- by one partner of the tort of another, ii. 272.

ADULTERY,

- accusation of, i. 248, 278, 291 n., 306.
- suit for, ii. 506.
- defences, ii. 508.
- proof of, ii. 507, 508.

ADVERSE,

- defeats constructive possession, i. 533, 571, 573 n.
 - use of watercourse, i. 647.
 - enjoyment of lights, i. 665.
 - possession or claim, waste in case of, ii. 98.
- (See **ASSIGNMENT**.)

ADVICE OF COUNSEL,

- in case of malicious prosecution, i. 458.
- a privileged communication, i. 362.

AGENCY,

- concealing, ii. 446.
- in publication of slander, &c., i. 413 n.

AGENT, (See **PRINCIPAL, &c., **MASTER**, &c.)**

- duties of, ii. 450.
- gratuitous, ii. 453.
- in case of limited authority, ii. 453.
- fraud of, i. 7 n., 24.
- without authority, whether bound by his contract, i. 33 n.
- purchase by, effect on possession, i. 567.
- conversion by, ii. 41.
- liability of corporation for their, ii. 275, 278, 290.

AGGRAVATION OF DAMAGES,

- for seduction, ii. 518.
- evidence of rank, standing, &c., in slander, &c., i. 425.
- in case of assault, i. 198 n., 205 n.
- repetition of words, i. 328.
- plea of the truth, in slander, &c., i. 408.

AGREEMENT AND INJURY, i. 2.**AIR AND WATER,**

- compared, i. 624 n.

ALIEN,

- rights, &c., of, in case of copyright, i. 719 n.

ALIEN, — *continued*.

rights, &c., of, in case of patent, i. 679 and n., 711.
trade-marks, i. 731.

ALMANACS,

copyright in, i. 713.

ALTERATION,

of written contract, by parol, i. 31 n.

AMBASSADOR,

slander, &c., of, i. 373.

AMERICAN CONSTITUTIONS,

as affecting rights of personal liberty, i. 298 n.

AMUSEMENT,

buildings for, whether nuisances, i. 588.

ANCIENT

pits, cleansing of, i. 631.

lights, i. 72, 612; ii. 662. (See LIGHTS.)

mill, &c., i. 648.

road, ii. 359.

ANIMALS' (See CATTLE, BAILMENT, RAILROAD, PROPERTY.)

at large, i. 508.

injury by, i. 154 n., 593.

form of action, i. 507.

injury to, i. 102.

pleading in actions for, i. 507 n.

property in, i. 504, 507.

per industriam hominis et ratione impotentia, i. 505.

ratione loci, i. 506.

kinds of, i. 504.

when a nuisance, i. 590.

attachment of, ii. 165, 167 n.

responsibility of innkeeper for, (See BAILMENT, INNKEEPER.)

carrier for, (See BAILMENT, CARRIER.)

distraining and impounding of, i. 508, 511, 593 n.

APOTHECARY,

slander, &c., of, i. 305.

joint action against, and physician, ii. 248 n.

APPEAL,

action for maliciously refusing to grant, ii. 120 n.

APPRAISAL,

in case of attachment, ii. 161.

(See PERISHABLE.)

APPRAISERS,

liability of, in case of wrongful replevin, ii. 254.

AQUEDUCTS, i. 623 n.

ARBITRATION,

malicious prosecution in case of, i. 474 n.

ARCHBISHOP,

libel upon, i. 299.

ARITHMETIC,

treatise on, copyright in, i. 713.

- ARREST,** (See FALSE IMPRISONMENT, MALICIOUS ARREST, RECAPTURE.)
 malicious, i. 439.
 without process, i. 208 n., 215.
 on a void *capias*, i. 216.
 a satisfied judgment, i. 220.
 by military authority, i. 209 n., 214, 237.
 on a search-warrant, ii. 146.
 what is an, i. 210.
 remedy for, i. 212.
 privilege from, i. 219.
 liability in such case, ii. 127.
 by private person, i. 208 n.
 whether necessary to suit for malicious prosecution, i. 433 n.
 in dwelling-house, i. 223 n.
 rights, duties, and liabilities of officer in relation to, i. 215, 222 n.;
 ii. 139, 201. (See OFFICERS.)
 rights, duties, and liabilities of party aiding in, ii. 255.
- ARSON,**
 charge of, slander, i. 262, 427 n.
 declaration in such case, i. 262, 393.
- ASSAULT.** (See DRUNKENNESS, CONTEMPT, TRESPASS.)
 definition of, i. 190.
 threats do not constitute an, i. 191. (See THREATS.)
 questions of law and fact as to, i. 191.
 whether a corporation may be sued for, ii. 274.
 instances of, i. 192.
 joint, ii. 242.
 declaration of intent not to commit, i. 193.
 battery — definition of, i. 193.
 instances of, i. 194.
 and battery, i. 193.
 definition and instances of, i. 194.
 defences in case of, i. 196.
 son assault demesne, 196.
 provocation, i. 197.
 breaking plaintiff's close, i. 198.
 molliter manus, &c., i. 200.
 intruder, i. 199.
 pleading, evidence, &c., i. 196.
 excess of force, i. 200.
 judgment, verdict, i. 206.
 in defence of master, ii. 449.
 in case of husband and wife, i. 206 n.; ii. 504.
 with intent to commit a rape, i. 192 n.
 in assertion of title, i. 149, 548.
 is a trespass, i. 190.
 malicious prosecution of, i. 433 n.
- ASSESSMENT,**
 of land damages in case of railroads, ii. 296.

ASSESSORS,

liability of, i. 107; ii. 219.

ASSIGNEE,

waste by, of tenant in dower and curtesy, ii. 94.
of lease, ii. 95.

ASSIGNMENT,

possession in case of, to secure debts, i. 566.
of right to a patent, i. 700.
patent, must be recorded, i. 702.
construction of, i. 703.
property held adversely, ii. 64.
attached goods, ii. 182.
right of action for a fraud, ii. 84 n.
conversion by wrongfully taking an, ii. 29.

ASSOCIATIONS,

voluntary, conversion in case of, ii. 229.

ASSUMPSIT,

for money collected by officer on an execution after the return-day, ii. 196.
on waiver of tort, i. 27, 40 n.; ii. 187 n.
implied promise of master to indemnify servant in case of trespass
ordered by him, ii. 471.
and case, i. 27, 32, 35.
and trespass, i. 28, 31.
and trover, i. 31, 32.
trover, and trespass, ii. 27 n.
for money had and received, i. 40.

AT LARGE,

animals, i. 508.

ATHLETIC SPORTS,

injury in, i. 195.

ATTACHMENT, (See OFFICER, EXECUTION.)

in case of bailment, ii. 582 n.
on a mutual account, i. 456.
malicious, i. 439, 443 n., 448, 452 n., 454, 470 n., 473, 479 n., 483.
conversion by, ii. 44, 56.
and execution, ii. 160, 177, 180.
an *alternative* remedy, ii. 162.
nature and purpose of, ii. 161.
officer's title to, and right of action for, property attached, ii. 162,
181 n.
title of a *receiptor* or keeper, ii. 163.
unknown to the common law, ii. 161.
of equity of redemption, ii. 178 n.
what is, and how proved, ii. 160 n.
how made on personal property, ii. 153 n.
what possession suffices, ii. 161 n.
conflict of, and priority, ii. 161 n.
effect of, on debtor's possession, ii. 161 n.
lien of, how lost, ii. 161 n., 177.

ATTACHMENT, — continued.

- when it may be made, ii. 162 n.
- illegal, when made, cannot be cured, ii. 162 n.
- against bailiffs for breaking open doors to execute process, ii. 88 n.
- of live animals, ii. 165, 167 n.
- receiptors and keepers*, ii. 160 n., 162, 166.
- mutual rights of receiptors and officer, ii. 166.
- officer's liability for them, ii. 168.
- their liability to debtor, ii. 170.
- indemnity in case of, ii. 170, 171, 179.
- of the property of a third person, or property not subject to attachment, ii. 172.
- of partnership property for private debt, ii. 271.
- liability of the officer to the defendant in the suit, ii. 174.
 - justice of the peace for excessive, ii. 172.
 - for failing to make, ii. 173.
- (See DOORS.)
- trespass *ab initio*, ii. 175.
 - unreasonable occupation by the officer, ii. 175.
 - use of personal property attached, ii. 176.
- levy of execution upon property attached; duty and liability of an officer, ii. 177.
- successive attachments, ii. 180.
 - intervening assignment by debtor, ii. 182.
- sale, &c., of property attached, ii. 176, 182.
- rights and liabilities of the sheriff, in connection with the acts of his deputy, ii. 182.
- effect upon, of the death of parties, ii. 183.
- duty of attorney as to, ii. 482 and n.
- property exempt from, ii. 186.
- in case of mortgage, (See MORTGAGE.)
- damages, ii. 185.

ATTORNEYS, (See ADVICE OF COUNSEL, BARRISTER, EQUITY.)

- rule *in pari delicto* does not apply to relations with client, i. 178.
- rights, liabilities, and duties in general, ii. 478.
- duties as to attachment, ii. 482 and n.
 - bail, ii. 482.
 - collection of money, ii. 483.
- liability in general to client, ii. 478. (See DAMAGES.)
 - burden of proof of diligence or negligence, ii. 480, 481.
 - for negligence in regard to suits, ii. 481.
 - what is negligence, ii. 481.
 - sufficiency of securities, ii. 485.
 - investigation of titles, ii. 485.
 - for shares intrusted to them, ii. 484 n.
 - to party wrongfully sued, ii. 490.
 - for causing a levy beyond the jurisdiction, ii. 491.
 - to other attorneys and sheriffs, ii. 492 n., 493 n.
- lien on papers for their fees, ii. 487 n.

ATTORNEYS, — continued.

opinion of Pollock, C. B., in *Swinfen v. Lord Chelmsford*, ii. 493.

negligence of, as a defence to their bill of fees, ii. 487.

partnership between, ii. 481 n.

slander of, i. 303.

title by, i. 359 n.

action against, for malicious prosecution, attachment, and arrest, i. 439.

concurrent remedies against, ii. 481 n.

demand by — trover, ii. 49.

AUCTIONEER,

rights of, i. 145.

liability of, in case of stolen goods, i. 64 n. ; ii. 458.

AUTHORS, (See COPYRIGHTS.)

copyright of, i. 712.

articles in periodicals, i. 717 n.

and publishers, mutual rights of, i. 718.

AUTREFOIS ACQUIT,

in tort, no bar to indictment, i. 60 n.

AWNING,

over sidewalk, liability of a city for injury from, ii. 369.

B.**BAGGAGE, (See BAILMENT, CARRIER.)**

liability of innkeeper for, ii. 534.

carrier, (See BAILMENT, CARRIER, CHECKS, PASSENGER.)

checks, ii. 574 n.

BAIL,

duty of attorneys with regard to, ii. 482.

liability of justice of the peace for refusing to take, ii. 111.

right of action and waiver thereof, for an unlawful requisition of, ii. 206.

rights and duties of officers as to, ii. 202.

taking insufficient, ii. 208.

maliciously holding to, i. 214.

bond, return of, ii. 209.

BAILEE,

action by, i. 521 ; ii. 553, 601.

BAILIFF,

whether liable for refusing to take a bail-bond, ii. 204.

BAILOR,

action by, i. 520 ; ii. 601.

BAILMENT, (See BANKS, DEPOSITS.)

tort, in case of, i. 24, 25, 38. (See SALE.)

conversion and trover, in case of, ii. 32, 49, 450.

attachment, in case of, (See ATTACHMENT.)

form of action in case of, i. 38.

a contract, ii. 524.

kinds of, ii. 524.

BAILMENT, — *continued*.

- depositum*, ii. 527.
 - liabilities in case of, ii. 527.
 - rights, ii. 527.
- mandatum*, ii. 527.
 - liability, ii. 527.
- commodatum* — loan, ii. 528.
 - extraordinary care, ii. 528.
- locatio* — hiring, ii. 529.
- liabilities of bailee, ii. 529.
 - irresistible force, ii. 530 n.
 - bailor, ii. 529 n.
- warehousemen, ii. 530. (See WAREHOUSEMEN.)
- wharfingers, (See WHARFINGER.)
- innkeepers, ii. 533.
 - who are, ii. 534.
 - rights of, i. 113 n.
 - lien, ii. 542.
 - liabilities in general, ii. 533.
 - for goods stolen, ii. 533.
 - burden of proof, ii. 534.
 - loss by fire, ii. 534.
 - action against, on the custom of the realm, i. 38 and n.
 - to whom responsible, &c., ii. 534 n., 535.
 - boarder and guest, ii. 534.
 - for what property, ii. 535.
 - animals, ii. 537.
 - loss from party's own neglect, ii. 539.
- common carriers, who are, ii. 544. (See RAILROADS.)
 - compensation, ii. 550.
 - tender of, ii. 551.
 - cannot refuse to carry, ii. 550.
 - burden of proof, ii. 547, 552 n., 555, 572, 576, 583 n., 584 n.
 - to whom liable, ii. 552.
 - consignor, ii. 552 n., 553.
 - consignee, ii. 552.
 - delivery to, ii. 554.
 - constructive, ii. 554.
 - beginning of responsibility, ii. 554.
 - duration of responsibility, ii. 557.
 - termination of responsibility, ii. 564.
 - delivery by, ii. 557.
 - to wrong person, ii. 574.
 - reasonable time, ii. 559, 564.
 - place, ii. 557.
 - notice to consignee, ii. 559.
 - nature of liability — act of God, &c., ii. 566.
 - as warehousemen, (See WAREHOUSEMEN.)

BAILMENT, — *continued*.

common carriers, nature of liability as affected by contract, ii. 572, n.
insurers, ii. 567.

what is act of God, ii. 567.

perils of the sea, ii. 571.

loss by fire, ii. 571.

carriers by water, ii. 568, 571, 582 n., 586 n.

limitation by bill of lading, ii. 572 n.

delay and unseaworthiness, ii. 571, 582 n.

rocks, shoals, &c., ii. 572 n.

form of action against — trover, ii. 41, 574.

change of liability by notice from, (See NOTICE.)

particular agreement, ii. 576.

waiver of notice, ii. 586.

right of carrier to know what he carries, ii. 578.

custom, &c., ii. 554, 571, 586.

passenger-carriers, ii. 586. (See RAILROAD.)

obligation to carry, ii. 586 n.

baggage, ii. 589.

animals, ii. 567 n. (See ANIMALS.)

rule *in pari delicto*. (See IN
PARI, &c.)

presumption in case of accident,
ii. 588.

regulation by, ii. 589 n.

ferries, (See FERRY.)

lien in case of, (See LIEN.)

BALLOON,

trespass in a, i. 105.

BANK BILLS,

redemption of, ii. 287 n.

BANK-NOTES,

trover for, i. 50.

BANK OF RIVER, i. 616 n.

BANKER,

action against, for dishonoring a check, i. 79.

liability of, as servant, ii. 450.

BANKRUPT,

liability for arrest of certificated, ii. 127.

BANKRUPTCY,

action for maliciously suing out a commission of, i. 445, 473.

— commissioners, immunity in their judicial capacity, ii. 109.

BANKS, (See CORPORATIONS.)

liability of officers of, ii. 402.

notice to cashier is notice to, ii. 291.

remedy of stockholders in case of joint stock, ii. 290.

rights, duties, and liabilities of, in general, ii. 281.

rights,

to harass another bank by presenting its bills, &c., ii. 281 n.

BANKS, — *continued.*

rights,

against debtors, ii. 289 n.

duties,

in collecting notes, &c., ii. 282.

respect to deposits, ii. 285.

redemption of bills, ii. 287 n.

liabilities,

 for mistake and fraud of cashier, clerks, &c., false entries, transfer of
 stock subscriptions, &c., ii. 281, 286, 290.

sub-agents, ii. 282.

notaries, ii. 284.

evidence and damages, ii. 285.

deposits, general and special, ii. 285.

checks, ii. 288.

BARRISTER, (See ATTORNEY.)

duties of, ii. 494.

BATTERY, (See ASSAULT.)

what is a, i. 193.

instances of, i. 194.

of wife, ii. 500.

BATH-HOUSES,

action for pulling down, i. 494 n.

BAWD,

charge of being a, i. 279.

BEES,

conversion of, i. 507.

BENEFICIAL SOCIETY,

expulsion from, ii. 280.

BETTERMENTS,

right of possession in connection with, i. 509.

BILL OF EXCHANGE,

trover for, i. 52.

liability of bank in collecting, ii. 282.

BILL OF PARTICULARS IN SLANDER,

effect of, i. 380.

BISHOP,

waste by, ii. 95.

BLACKLEG,

charge of being a, i. 295.

BLACKSMITHY,

when a nuisance, i. 119.

BLASTING,

injuries by, i. 119, 129.

a proper method of making cuts for a railroad, ii. 298.

BOARDER AND GUEST, (See BAILMENT — INNKEEPERS.)**BONA FIDE,**

purchaser from fraudulent vendee, i. 22, 23 n.; ii. 80.

creditor, assignment to, from fraudulent vendee, ii. 80.

BONA FIDES,

what, in sales, ii. 81.

whether a defence in action against an officer, ii. 124.

for malicious prosecution, i. 451.

in other cases, i. 13.

in privileged communications, (See PRIVILEGED COMMUNICATIONS.)

BOND, (See BAIL.)

trover for, i. 52 n., 55; ii. 59.

BOOK-KEEPING,

copyright in works on, i. 725.

BOOKS, (See COPYRIGHT, AUTHORS.)

criticisms on, i. 358, 362.

proof of publication of, i. 421.

copyright in, i. 712.

BOUNDARY, .

misrepresentation as to, ii. 78.

by user, i. 550.

BOWLING ALLEY,

whether a nuisance, i. 588.

BOXING-MATCH,

injury in, i. 196.

BRAKEMAN. (See RAILROAD, MASTER, &c.)**BRANDS.** (See TRADE-MARKS.)**BREACH,**

of privilege, arrest for, i. 209 n.

the peace, arrest for, i. 225.

in abating a nuisance, i. 607.

whether a justification of an arrest without warrant, i. 224.

trust, conversion by, ii. 39.

BREAKING OF DOORS BY OFFICERS. (See OFFICERS, DOOR.)**BRIDGE,**

trespass for pulling down, i. 501, 523 n.

liability for defects in, ii. 372 n., 383, 384 n., 397.

BROKER,

liability to principal, ii. 442 n., 452.

for concealment, i. 8.

negligence, i. 39.

BUILDING,

a house, when waste, ii. 92.

BUILDINGS, (See LIGHTS.)

as fixtures, i. 491, 494, 536.

excavation of soil adjoining, i. 670.

supporting, i. 500.

trover for, i. 493; ii. 58.

trespass for tearing down, in case of mortgage, (See MORTGAGE.)

what is waste as to, ii. 92.

BURDEN OF PROOF, (See PRESUMPTION.)

as to negligence, i. 130, 136, 164.

as to the plaintiff's own conduct, i. 136, 143.

BURDEN OF PROOF, — *continued.*

- in tort, in general, i. 75.
 - case of assault, i. 200 n.; ii. 265.
- of justification in slander, i. 321 n., 398.
- on a plea of repetition, i. 410.
- in collisions in driving, i. 164.
 - action for malicious prosecution, (See **MALICIOUS, &c., MURDER, &c.**)
- as to possession, i. 570.
- in action against an officer, ii. 131.
 - for unlawful impounding, i. 515.
 - for an escape, ii. 215.
- in trespass *quare clausum*, i. 519 n., 553 n., 570; ii. 11.
- as between attorney and client, ii. 480.
- in case of carriers, ii. 547, 552, 572, 583 n., 588.
 - innkeepers, ii. 534.

BUSINESS, &c.,

- slander relating to, i. 293, 306.
- communications, privileged, i. 364.

BUYER,

- fraud of, ii. 79.

BY-LAW,

- of railroad, construction of, ii. 328.

BYSTANDERS,

- understanding of, in slander, i. 289, 291, 316.

C.**CAB PROPRIETOR,**

- liability for default of driver, ii. 423 n.

CANAL CORPORATION,

- liability of, ii. 273, 394.
- land damages against, i. 111.

CANDIDATES,

- slander of, i. 298, 356.

CANDLE-MAKING,

- nuisance by, i. 585 n.

CARE, (See **NEGLIGENCE, GUN, MACHINERY, MINES.)**

- ordinary, i. 123, 134.
 - in case of traveller on a highway, i. 142.
- utmost, i. 129, 157.
 - guns, i. 127.
 - mines, i. 127.
 - machinery, i. 128.
 - when no defence, i. 128.
- commensurate to capacity, i. 157.
- in case of building dams, i. 640 n.

CARICATURE,

- libel by, i. 247 n.

CARRIERS. (See **WARRANT.)**

CASE. (See ACTION ON THE CASE, TRESPASS, TRESPASS ON THE CASE.)

CASHIER,

notice to, is notice to bank, ii. 291.

liability of, in trover for bank-notes, ii. 401.

to the bank, ii. 403.

CATTLE, (See ANIMALS.)

injuries to, i. 507.

and fences, i. 508.

in case of railroads, ii. 337.

CAUSA PROXIMA NON REMOTA SPECTATUR, i. 82 n., 88, 140 and n.

in case of highways, ii. 374.

CAVEAT EMPTOR, i. 9 n.; ii. 81.

CELLAR,

liability for unsafe flap, i. 538.

CERTIFICATES,

official, whether libellous, i. 357.

of stock, fraudulent, ii. 278.

CHAMPERTY, i. 58.

CHANCERY. (See EQUITY.)

CHARACTER,

evidence of, i. 197, 409, 422, 455.

to what limited, i. 423.

in case of seduction, ii. 518.

of servant, communication concerning, i. 369.

for chastity, proof of, i. 424.

injuries to, i. 241, 433. (See LIBEL, MALICIOUS PROSECUTION.)

CHART,

copyright in, i. 712, 716.

CHARTER,

abuse of, i. 579.

duties of corporations, how affected by, ii. 397.

acts done under, whether a nuisance, i. 578, 605 n.

CHASTISEMENT,

of servant, ii. 472. (See HUSBAND, PARENT.)

CHASTITY,

charge of want of, i. 248, 261, 278, 301, 320, 386, 431.

proof of character for, i. 424.

CHEATING, (See FRAUD, DECEIT.)

accusation of, whether slanderous, i. 275, 293, 303, 307.

CHECKS,

trover for, i. 52.

liability of banks for, ii. 288.

for baggage, ii. 589 n.

CHEMICALS,

nuisance by manufacture of, i. 585 n.

CHILD. (See PARENT.)

abduction of, ii. 520.

injury to, what is the measure of negligence, i. 157.

CHOSSES,

- in action and in possession, i. 2 and n.
- trover for, i. 49, 55; ii. 59.
- measure of damages, ii. 63 n.

CHURCH,

- action by, for a nuisance, i. 72.
- communications in, privileged, i. 345.

CHURCH-WARDEN,

- slander, &c., of, i. 367.

CIRCUIT COURT,

- jurisdiction of, in patent cases, i. 711.

CITIZENSHIP,

- its bearing on the law of patents, i. 679 n., 711.
- copyright and trade-marks, i. 719 n.

*CITY. (See TOWNS.)**CITY RAILROAD,*

- whether a nuisance, i. 71, 578.

CIVIL,

- wrong, a tort is a, i. 1.

CIVIL ACTION,

- whether it can be a malicious prosecution, i. 456.

*CLAIM. (See SPECIFICATION.)**CLAIM OF TITLE,*

- a defence to suit for malicious civil prosecution, i. 456.

CLASS OF PERSONS,

- libel upon, i. 317.

CLAY,

- the subject of waste, ii. 91.

CLERGYMAN,

- slander of, i. 301, 353.

CLERK OF COURT,

- deputy, trespass against, for wrongfully issuing execution, ii. 115.
- liability of, ii. 217.

*CLIENT. (See ATTORNEY.)**CODE OF NEW YORK,*

- operation on pleading in slander, i. 395 n.

COLLECTION,

- of notes, liability of banks for, ii. 282.
- of money by attorney, ii. 487.

COLLECTOR OF TAXES,

- liability of, ii. 220.

COLLISION, i. 93 and n., 141 and n.; ii. 412.

- with cattle, (See ANIMALS, CATTLE, RAILROADS.)
- joint action against two railroad corporations for accident by, ii. 247.
- measure of damages, i. 86 n.

COLLOQUIUM, i. 280, 286, 294, 299, 316, 320 n., 382, 386.

- rejected as surplusage, i. 388 n.
- and innuendo, i. 389.

- COLLUSION,
 of husband, a defence to action for criminal conversation, ii. 508.
- COLOR OF PROCESS,
 action for injuries done under, i. 106.
- COMBINATION,
 patent for, i. 683, 692, 698.
- COMMENCEMENT OF ACTION, i. 515.
- COMMISSION MERCHANT,
 liable for selling articles pirating a trade-mark, i. 732.
- COMMISSIONER, (See COUNTIES.)
 in chancery, liability for exceeding his jurisdiction, ii. 115.
 under statutes, liability of, ii. 398, 437.
 of public works, liability for acts of workmen, ii. 430, 437.
- COMMISSIONS,
 account of, in case of copyright, i. 724.
- COMMITMENT,
 wrongful, action for, ii. 108, 112.
 for contempt, ii. 103 n., 115 and n.
- COMMODATUM, ii. 528.
- COMMON,
 action relative to, i. 523 n.
- COMMON CARRIERS. (See BAILMENT, RAILROADS, PASSENGERS, BAGGAGE.)
- COMMON LAW,
 as to copyright, i. 712 n., 724.
 highways, ii. 357.
- COMMON-LAW PROCEDURE ACT,
 as to *colloquium*, i. 391 n.
- COMMONWEALTH *v.* TEMPLE,
 Shaw, C. J.'s judgment in, ii. 306.
- COMPENSATION,
 of carrier, ii. 550.
- COMPILATION,
 copyright as to, i. 712.
- COMPLAINTS,
 when privileged communications, i. 357.
- COMPOSITION,
 patent for, i. 683, 691.
- COMPOUNDING OF CRIME, ii. 117
- CONCEALMENT, i. 7, 18 n.
 by third party, i. 7, 9 n.
- CONCERTED ACTION,
 necessary to joint tort, ii. 247.
- CONCORDANCE,
 copyright in, i. 713.
- CONCURRENT,
 possession, i. 530.
 civil and criminal proceedings, i. 60.
- CONDITIONAL SALE,
 conversion in case of, ii. 33.

- CONDITIONAL SALE, — *continued*.
 fraud in, i. 22.
 possession, in case of, i. 560, 565.
- CONDUCTOR, (See RAILROADS.)
 rights of, as against railroad, ii. 462.
- CONFESSION,
 as evidence, i. 61.
- CONFIDENTIAL COMMUNICATION,
 whether slanderous, i. 244, 303 n., 345, 364.
 (See PRIVILEGED COMMUNICATION.)
- CONFUSION OF GOODS, i. 502, 504 n.; ii. 137.
 rights of creditors, i. 503 n.
 in case of warehousemen, ii. 532 n.
 attachment, ii. 161 n., 172, 182, 531.
- CONIES,
 property in, i. 506.
- CONNECTING RAILROADS, ii. 319, 566.
- CONSEQUENTIAL INJURY, (See RAILROADS.)
 where limited, i. 88, 120, 206.
- CONSIDERATION,
 necessary to contract, i. 31 n.
 illegal and immoral, i. 58.
 in case of bailment, i. 133; ii. 550 and n.
- CONSIGNEE,
 possession of, i. 556, 559.
 conversion by, ii. 30, 296.
 and consignor — carrier, (See BAILMENT.)
- CONSPIRACY, i. 35, 439; ii. 242, 256.
 (See DECLARATION, EVIDENCE.)
 in case of slander, i. 319.
 indictment for, ii. 256.
 what is an actionable, ii. 256.
 must affect legal rights, ii. 256.
 to defraud creditors, ii. 257.
 to defame, ii. 260.
 and malicious prosecution, i. 435, 440.
 to hiss an actor, ii. 246.
- CONSTABLE, i. 208 n., 220, 233 n. (See OFFICER.)
 slander of, i. 290.
- CONSTITUTIONAL
 right of personal liberty, i. 208.
 legislators to free discussion, i. 334 n.
- CONSTRUCTION,
 of railway by-law, ii. 328.
 libel, &c., i. 251, 283.
 evidence, i. 289.
 in mitiori sensu, i. 290.
 patent specification, i. 695, 700.

CONSTRUCTIVE,

- entry, ii. 5.
- fraud, ii. 74, 79.
- possession, i. 533, 551, 553, 571.
 - limited by the intent, i. 552 n.
 - by sale of personal property, i. 555.
- delivery, i. 555; ii. 554.
 - by railroads, ii. 317.

CONTAGIOUS DISEASE,

- as a nuisance, i. 587.

CONTEMPT,

- commitment for, i. 209 n. (See **COMMITMENT**.)
- by assault in a court-room, i. 206 n.

CONTINGENT REMAINDER,

- will not sustain an action of waste, ii. 93.

CONTINUANCE,

- of tort, action for, i. 49, 446, 455, 600, 658; ii. 6.
 - (See **TRESPASS**.)
- imprisonment, action for, i. 213.
- prosecution, malicious, i. 446.
- nuisance, i. 600, 682.

CONTINUANDO, i. 394 n., 572.**CONTINUING WARRANTY,**

- liability on, i. 10 n.

CONTRACT,

- definition of, i. 1.
- and tort, ii. 73.
 - connection between, i. 3-58.
 - may be coincident, i. 3.
 - in case of carriers, i. 37; ii. 567.
 - surgeon, i. 239.
 - lease, ii. 603.
 - bailment, i. 38; ii. 526, 584 n.
 - husband and wife, ii. 500 n., 505.
 - pleadings in case of, i. 34.
- abandonment of, i. 31 n.
- written, obtained by fraud, i. 7.
- consideration, necessary to, i. 31 n.
- altered by parol, i. 31 n.
- implied, and waiver of tort, i. 40.
- a defence to action for a joint tort, ii. 251.
- illegal and immoral, i. 58; ii. 455 n.
- against public policy, i. 58.
 - express notice by common carriers, ii. 315.
 - contract by railroads to enlarge their liability, ii. 319 n.
 - in restraint of marriage, i. 58.
 - trade, i. 58.
 - public justice, i. 58.
 - sale of offices, i. 58.

CONTRACT, — *continued.*

- fraud requires, ii. 73.
- and fraud, distinction, ii. 75 n.
- and judgment, i. 47.
- to commit a tort, i. 58.

CONTRACTOR AND SERVANT. (See MASTER AND SERVANT.)

- Judge Thomas's review of Massachusetts cases on this subject, ii. 435 n.

liability of, for sub-contractor's acts, ii. 430.

CONTRIBUTION,

- in case of tort, i. 2, 188 n.

CONVERSION, i. 80; ii. 26. (See TROVER.)

- by symbolical delivery, ii. 30.
 - taking of a part, ii. 31.
 - wrongful purchase, ii. 29, 30.
 - taking a wrongful assignment, ii. 29.
 - wrongful sale, ii. 28, 30, 39, 47, 228.
 - assertion of a claim with threats, ii. 43.
 - sale by collector, ii. 220.
- what constitutes, and the foundation of an action of *trover*, i. 76, 81 n.
- by misuse, &c., ii. 28, 32.
- in case of bailment, i. 25; ii. 32, 38, 43, 245, 451, 531.
 - conditional sale, ii. 33.
 - goods obtained by *fraud* or *mistake*, ii. 36, 42, 441.
 - duress, ii. 36, 43.
- by breach of trust, ii. 39.
 - guardian, ii. 39.
 - agent, ii. 39.
 - administrator, ii. 40.
 - factor, ii. 40.
- must be to one's own use, ii. 40.
- cannot be cured by redelivery, ii. 71.
- in case of legal process, ii. 44, 137, 156, 172.
- by public officers, ii. 44.
- demand and refusal, when sufficient proof of, ii. 48 and n.
 - (See DEMAND.)
 - what is a sufficient, ii. 49.
 - in case of joint conversion, ii. 245, 250.
 - rebutting proof, ii. 50.
 - inability of the defendant to deliver the property, ii. 50.
 - doubt of the plaintiff's title, ii. 52.
 - detention by legal authority, &c., ii. 55.
 - reasonable delay for advising, ii. 54.
 - property in custody of law, ii. 56, 137, 156, 162, 169.
- nature of the property
 - converted, ii. 57. (See TROVER.)
 - things affixed to the realty, ii. 57.
 - growing trees, ii. 57.

CONVERSION, — *continued.*

- nature of the property, choses in action, &c., ii. 59.
 - notes, i. 50.
 - bees, i. 507.
- parties in trover, ii. 63. (See TROVER.)
- pleadings in trover, ii. 66. (See TROVER.)
- practice in trover, ii. 71 n. (See TROVER.)
- damages, ii. 69. (See DAMAGES.)
- between joint tenants, &c., ii. 226.
- by carrier, ii. 43. (See BAILMENT, CARRIER, TROVER.)
 - infant, ii. 523.
 - consignee, ii. 30, 296.
 - receiptor, ii. 170.
 - joint tort-feasors, ii. 245, 250.
 - a question for the jury, ii. 251.
- requires possession, i. 540; ii. 50.
- and trespass — distinction, ii. 2. (See TRESPASS.)
- of land — waste, ii. 87, 91.
- in case of partnership, ii. 271.
 - servant, ii. 408 n., 414, 447.
 - wife, ii. 504.
 - mortgagee and mortgagor, ii. 617.
 - administrator, ii. 40.
- time of, ii. 28 n., 35, 48 n., 54.
- intent in case of, ii. 29, 40.

CONVICTION,

- whether necessary to sustain trover for stolen goods, i. 63.
 - a bar to an action on the tort, i. 60 and n.
- liability of Justice in case of, ii. 116.
- conclusive evidence in an action for false imprisonment, ii. 116.
- effect of, in justification of slander, &c., i. 406.

COOLING TIME,

- assault, i. 197 n.

COPPICES, (See WASTE.)

- right to cut, ii. 89.

COPYRIGHT, i. 612, 712.

- at common law and by statute, ii. 1, 7, 12, 724.
- how secured, i. 712.
- in what, i. 713.
- nature, &c., and infractions, i. 712, 724.
- abridgments and quotations, i. 714.
- compilation, i. 712.
- concordance, i. 713.
- translations, i. 715.
- price-current, i. 715.
- works on book-keeping, i. 725.
- charts, &c., i. 712, 716.
- encyclopædias, i. 713.
- law reports, i. 716.

COPYRIGHT, — *continued.*

- marginal notes, i. 716.
- almanacs, i. 713, 729.
- periodicals, i. 717 n.
- dramatic compositions, i. 717 n.
 - license, i. 717 n.
- designs* (in England), i. 718 n.
- foreigners, i. 719 n.
- rights of authors and publishers, i. 718.
- registration, i. 722.
- assignment, i. 721, 722.
- sale by execution, i. 723 n.
- implied warranty, i. 723.
- remedies — injunction, account, &c., i. 723.
- manuscripts, i. 724.
- private letters, i. 725.

CORN,

- trover for growing, when severed, ii. 58.

CORONER,

- trespass against, for excluding a person during an inquest, ii. 117.

CORPORAL PUNISHMENT,

- by teacher, i. 196, 202.
 - master of ship, i. 200 n.
- of servant. (See MASTER.)
- child, i. 196.
- wife, ii. 507.

CORPORATIONS, ii. 321. (See BANKS, RAILROADS, TOWNS.)

- slander, &c., in case of, i. 319; ii. 273.
- abuse of charter, i. 579.
- general liabilities of corporations for tort, ii. 273.
- for what torts and in what actions corporations are liable, ii. 274.
- liabilities for agents, &c., ii. 274, 278, 281, 289, 410, 424, 429, 439.
 - fraud of agents, ii. 286.
 - of the president as agent, ii. 278.
- rights of stockholders, ii. 279, 280, 402 n.
 - transfer of shares, i. 108 n.
 - expulsion of members, ii. 280.
- canal corporations, i. 111; ii. 273, 394.
- banks — general liability, ii. 281. (See BANKS.)
 - negligence in collection of notes, &c., ii. 282.
 - deposits, ii. 285.
 - checks, ii. 288.
 - liabilities for officers and servants, ii. 289.
- railroads, (See RAILROADS, CARRIERS, BAILMENT, PASSENGERS, BAGGAGE, IN PARI, &c.)
 - in connection with streets, ii. 300.
 - are common carriers, ii. 313.
 - when warehousemen, (See WAREHOUSEMEN.)

CORPORATIONS, — *continued*.

- railroads, what is a delivery, ii. 316, 317.
 - passengers, ii. 321, 330.
 - cattle and fences, (See ANIMALS, CATTLE, FENCES.)
- liability of officers, &c., of a corporation, ii. 279, 401.
 - as trustees in equity, ii. 279.
 - form of action for negligence by, i. 104.
- municipal corporations, ii. 356. (See TOWNS, COUNTIES, HIGHWAYS, IN PARI, &c.)
 - liability for highways, i. 70, 142; ii. 356.
 - for what roads a town, &c., is responsible; laying out, use, &c., ii. 359.
 - "safe and convenient," meaning of the terms; what constitutes a *defect or obstruction*, a question for the jury, ii. 362.
 - snow and frost, ii. 358, 366.
 - want of lights, guards, railings, &c., ii. 367.
 - sidewalks, ii. 368.
 - notice of the obstruction; implied notice, ii. 369.
 - the plaintiff must not have been himself in fault, ii. 371.
 - nature and proof of the injury, ii. 379.
 - liability of a town for highways as affected by that of other parties, ii. 380.
 - injuries caused by railroads, &c., ii. 380.
 - general nature of the action; pleadings, ii. 383.
- remedy against, for acts under statutes, i. 110.
- general liability of municipal and similar corporations, ii. 386. (See TOWNS.)
- liability of corporation acting under express charter, ii. 397.
 - action on the case, ii. 387.
 - of individuals acting under statutory authority, ii. 397.
 - whether joint or several, ii. 397.
- member of, arrest of, on process against the corporation, ii. 128.
 - liability of, for a corporate act, ii. 401.
- action by, for a nuisance, i. 73.
- officers of, ii. 401.
 - their liability to third persons, ii. 401.
 - to the corporation, ii. 402.
 - neglect, ii. 403.
 - mistake, ii. 404.

CORPOREAL PROPERTY, i. 489.

CORRUPTION

- of water, i. 633, 651 n.
- judges, ii. 102.

COSTS, i. 411.

- in trespass, ii. 3.

COUNSEL. (See ADVICE, ATTORNEYS.)

COUNTERFEITING,

- accusation of, i. 278.

- COUNTIES, liability to suit, ii. 356 n.
 for county commissioners, ii. 356 n.
 sheriff, ii. 356 n.
- COUNTS IN SLANDER, &c., i. 379, 381, 431.
 (See DECLARATION, PLEADING.)
 abandonment of, i. 379.
- COURT-MARTIAL,
 report of, privileged, i. 357.
 malicious prosecution before a, i. 434 n.
- COURTS,
 proceedings in, privileged, i. 336.
 reports of, i. 339, 373, 413 n., 716.
 exclusion from, ii. 117.
- COVENANT
 and case, actions of, i. 27, 31.
- CREDIT,
 fraudulent representation of, (See FALSE RECOMMENDATION, FRAUD,
 SCIENTER.)
- CREDITOR,
 fraud by, ii. 79.
 as receiver, ii. 167 n.
 can maintain no action for goods levied on under execution in his favor,
 ii. 200.
 conspiracy to defraud, (See CONSPIRACY.)
 of tenant in common, (See TENANTS IN COMMON, JOINT PARTIES.)
- CRIME,
 definition of, i. 60.
 accusation of, is slanderous. (See LIBEL, &c.)
 when privileged, i. 362.
 compounding of, ii. 117.
 malicious prosecution for, i. 433 n.
- CRIMES AND TORTS, i. 406.
 (See TORT AND CRIME.)
- CRIMINAL CONVERSATION, (See HUSBAND, ADULTERY, SEDUCTION,
 EVIDENCE.)
 action for, ii. 506.
 collusion of husband, ii. 508.
- CRITICISM,
 whether libellous, i. 356, 358.
- CROP, (See EMBLEMENTS.)
 rights of landlord and tenant as to, ii. 605.
 title to, i. 497 n., 523 n.
 trover for, ii. 58, 227.
- CROSSINGS
 on railways. (See RAILROADS.)
- CRUELTY
 of husband, ii. 506 n.
- CULVERT,
 duty of railroad as to, ii. 312.

CULVERT, — *continued*.

whether town is liable for defect in, under highway, ii. 358.

CURATE,

perpetual, waste by, ii. 96.

CUSTODY OF LAW,

trover in case of, ii. 55.

CUSTOM OF THE REALM, (See **USAGE**.)

action on, against carriers, i. 38 and n.; ii. 266. (See **CARRIERS**.)
innkeepers, i. 38 and n.

CUSTOMS,

liability of officer of, i. 116 n.; ii. 224.

CUTS,

copyright in, i. 712.

CUTTING OF TIMBER,

trover for, ii. 57.

by grantor in possession, trespass for, ii. 6.

CYCLOPÆDIAS,

copyright in, i. 713.

D.

DAM, i. 624 n., 634. (See **WATERCOURSE**, **MILL-DAM**, **IN PARI DELICTO**.)

vendee of land not liable for injury by, built by person in possession at
time of purchase, ii. 427 n.

nature of injury to, i. 613.

injury by, i. 120, 613.

DAMAGE, i. 76.

remote, (See **CONSEQUENTIAL INJURY**.)

action for alleging excessive, i. 46 n.

as affecting locality of action, i. 77 n.

when presumed, i. 77, 80, 626; ii. 158.

when it must be proved in slander, &c., i. 359.

in malicious prosecution, i. 437.

DAMAGES, (See, also, **MITIGATION** and **AGGRAVATION OF DAMAGES**, **JOINT TORTS**, and **VARIOUS ACTIONS AND INJURIES**.)

measure of, for conversion of choses in action, ii. 63 n.

in trover, i. 57 n.; ii. 60 n., 69, 71, 229.

time, profits, detention, value to plaintiff, ii. 69.

aggravation, mitigation, interest, ii. 70.

qualified property, non-production, &c., ii. 70.

for notes, i. 50, 57.

account, ii. 60.

for assault, &c., i. 197, 206.

slander, &c., i. 328, 408, 411.

exemplary, i. 429.

on demurrer and default, i. 432.

malicious prosecution, i. 437, 485.

vindictive, i. 474 n.

in case of patent, i. 708.

DAMAGES,—*continued*.

- in case of bailment, i. 522 n.
- watercourse, i. 626.
- measure of, in trespass, i. 545; ii. 17, 168.
- fraud, ii. 79.
- for cutting down trees, i. 496 n.
- in waste, ii. 90, 97 n.
- for various other wrongs, i. 91 n.
 - causing death of minor son, i. 87 n.
 - injuries to health, &c., i. 239 n.
 - obstructing lights, i. 669.
 - tortious excavation, i. 92 n.; 673.
 - malicious arrest, i. 238 n.
- in action by tenant for injuries to his possession, ii. 603 n.
 - against banks, ii. 285 n.
 - for neglect in collecting notes, ii. 285.
 - attorney for neglect, ii. 484 n.
- for illegal marine capture, i. 86 n.
 - criminal conversation, ii. 509.
 - collision, i. 86 n.
 - seduction, i. 86 n.; ii. 509, 518.
 - nuisance, i. 602.
 - flowage, i. 642.
 - delay of common carrier, i. 86 n.
 - false return, ii. 181.
 - injury on railroads resulting in death, ii. 347.
 - from defect ve highway, ii. 380, 499.
- against officer. (See OFFICERS, ATTACHMENT, EXECUTION, ARREST.)
- in case of joint defendants. (See JOINT TORTS.)
- pro rata* in action by one of several joint-tenants, ii. 239.
- mitigation of, in slander, &c., i. 243, 328, 396, 426, 429 and n.
 - (See JUSTIFICATION, PLEADING, TRUTH.)
 - trespass, *qu. cl.* i. 548; ii. 13, 14 n., 23.
 - assault, i. 197, 206.
- for injuries by railroad in taking land, &c., ii. 295. (See RAILROADS.)

DAMNUM, i. 76 n.

absque injuriâ, i. 76, 77 n., 621, 623 n., 630; ii. 391.

DEADLY WEAPON,

use of, i. 200.

DEATH,

- effect of, on right of action in tort, i. 2.
 - attachments, ii. 183.
- action for causing, i. 87 and n.
 - in case of railroads, ii. 342.
 - damages, i. 87 n.

DEBATE,

privilege of, i. 334 n.

DEBT,

and case, i. 32.

DEBT, — *continued.*

for escape, ii. 214.

and tort, i. 2 n.

DEBTOR,

when liable for concealment at the sale, by his trustee for creditors, i. 8.

fraudulent representations by, to creditor. (See FRAUD.)

DECEASED PERSON,

libel of, i. 252.

DECEIT, (See FRAUD.)

action for, i. 3.

whether *scienter* is necessary, i. 13.

whether a vendor may bring, i. 18 n.

DECENCY,

nuisance against, i. 585.

DECLARATION, (See ADMISSIONS, AVERMENTS, EVIDENCE, PLEADING, VARIANCE.)

when contract and tort coincide, i. 3.

in actions of deceit and on a warranty, i. 4, 15.

must state the injury accurately, i. 91 n.

in tort and contract, i. 34, 38, 39.

for negligence, i. 93 n., 132.

assault, i. 193.

slander, &c., as to business, &c. (See LIBEL, BUSINESS, COLLOQUIUM.)

injury from neglect to perform statutory obligations, i. 108 n.

when statute remedy is provided, i. 110.

for injury, by animals, i. 595.

negligence of attorney, ii. 482 n., 487 n.

injury to a mine from flowing it, i. 121.

personal injury, in an action by husband and wife, ii. 501 n.

enticing away wife, ii. 509.

in slander, in general. (See LIBEL, SLANDER, COLLOQUIUM, INNUENDO, PLEADING, JUSTIFICATION.)

parties, i. 316.

amendment of, i. 380.

statutory forms, i. 376 n.

for negligence, i. 132.

bite by defendant's horse, i. 132.

malicious prosecution, i. 437, 470 n., 475.

in action for seduction, ii. 512.

for injury to animals, i. 507 n.

watercourse, i. 615, 619 n.

by excavation, i. 673.

trespass, ii. 3 n., 10.

cutting down trees, i. 495 n.

in trover, i. 57 n., 58; ii. 67.

what is a sufficient description of the property, ii. 67.

on the custom of the realm against carriers, i. 38 n.

for fraud, ii. 75, 77.

conspiracy, ii. 260.

DECLARATION, — *continued.*

for defective highway, ii. 383.

in case of master and servant, ii. 418 n.

DECOY,

disturbance of, i. 506.

DEDICATION,

of a street, what is evidence of, i. 539.

an invention to the public, i. 684, 697 n.

DEEDS,

as evidence of ownership and possession, i. 553.

what passes by, i. 498.

trover for, i. 56.

trespass for taking away, ii. 5.

detinue for, i. 57.

possession under, i. 553 n.

DEER, i. 480.

DE FACTO AND *DE JURE* OFFICER, ii. 122 n.

DEFAULT,

in libel, slander, &c., i. 432.

DEFECTIVE HIGHWAY, (See CORPORATIONS, TOWNS, DAMAGES, HIGHWAY, WAYS.)

care of traveller, i. 142.

what is a, ii. 362 and n.

DEFENCE,

of possession — when an assault, i. 198.

on the ground of possession, i. 534.

DE INJURIA SUA, &c.,

in case of assault, i. 200, 205; ii. 25.

false imprisonment, i. 218 n.

DELIVERY,

symbolical and partial — conversion, ii. 30.

effect of, on title and possession, i. 560.

by vendor, i. 534.

constructive, i. 555; ii. 554.

by railroads, ii. 317.

to carrier, ii. 554.

by carrier, (See BAILMENT, COMMON CARRIERS, CORPORATIONS, RAILROADS.)

waiver of, ii. 563.

DELIVERY ORDER, &c.,

as evidence of title, i. 21.

DEMAND, (See CONVERSION, TROVER.)

and refusal — trover, i. 3 n., 19.

in replevin and trespass, i. 20 n.

by agent — sufficiency, ii. 52.

reasonable delay, ii. 54.

demand on one in case of joint conversion, ii. 245.

when necessary to action against a receiptor, ii. 169.

DE MELIORIBUS DAMNIS, ii. 267 n.

DE MINIMIS NON, &c., i. 80 n.

DENTIST,

for what skill responsible, i. 240.

DEPOSIT,

liability of bank in case of, ii. 285, 401.

DEPOSITARY,

suit by and against, ii. 601.

DEPOSITUM, ii. 527. (See BAILMENT.)

DEPUTY-CLERK. (See CLERK.)

DEPUTY-SHERIFF, ii. 138 n., 150, 197 n., 198 n., 406.

(See JOINT ACTION, OFFICERS.)

DESCRIPTION,

of *locus in quo* in trespass, ii. 10.

of property in trover, ii. 67.

DESIGNS,

copyright of, in England, i. 718 n.

DE SON TORT DEMESNE, i. 1 n.

DETENTION,

damages for, in trover, ii. 69.

of watercourse, i. 632.

DETINUE,

effect of judgment in, i. 48.

between tenants in common, ii. 227 n.

for title-deeds, i. 57.

by husband and wife, ii. 502.

DEVASTAVIT,

by wife, ii. 505.

DEVIATION,

from regular employment, in case of master and servant, ii. 416.

DICTIONARY,

copyright in, i. 713.

DIGGING, &c., (See EXCAVATION.)

waste, ii. 91.

DILAPIDATION,

by perpetual curate, ii. 96.

DILIGENCE. (See CARE, NEGLIGENCE.)

DIRECT AND CONSEQUENTIAL INJURY,

to incorporeal property, i. 612.

DISABILITY TO CONTRACT, i. 2.

DISCLAIMER,

in case of patent, i. 698, 700.

DISCOVERY,

accidental — in case of patents, i. 687.

DISCUSSION,

freedom of, i. 334 n.

DISEASE,

accusation of, i. 280, 282.

DISHONESTY,

accusation of, i. 275, 384.

DISMISSAL OF SERVANT, ii. 472.

DISPOSITION,

to commit a crime — charge of, i. 254.

DISSEISIN,

by levy of execution and acts under it, i. 573.

defeats the possession necessary to support an action, i. 533.

entry in case of, i. 547, 552 n., 572.

what is, in case of joint tenants, &c., ii. 232.

DISSEISOR,

action by, i. 525.

DISTRESS OF ANIMALS, i. 508, 510 and n., 593 n.

what user protects them, i. 512.

unlawful, action for, i. 81; ii. 410.

action on the case, i. 102.

DISTRICT,

incorporated, liability for acts of its officers, ii. 410.

DISTRICT ATTORNEY,

action against, for malicious prosecution, i. 440.

DISUSE. (See ABANDONMENT.)

DOG,

setting on, i. 507, 511.

injury by, to a child, ii. 522.

to a trespasser, i. 165 n.

when a nuisance, i. 590.

injury to, and trover for, i. 151, 506.

owners of two dogs, whether liable for damage by both, ii. 268 n.

keepers and owners of, ii. 269 n.

owner's liability for act of his servant in setting on, ii. 413.

(See ANIMALS.)

DOMESTIC ARTICLES.

as fixtures, i. 491.

DOOR,

what an outer, ii. 18, 20.

breaking of, i. 221, 223 n.; ii. 18, 20.

by officers, ii. 18, 20.

to get out, ii. 19, 21.

DOVES, i. 505.

DOWER. (See TENANT IN DOWER.)

DRAFT,

conversion of, ii. 63.

DRAINS, i. 539, 623 n.

DRAMATIC COMPOSITIONS,

copyright in, i. 717 n.

DRAWINGS,

in patents, i. 695.

DRIFT-WOOD, i. 498.

DRIP, i. 677.

DRIVING, (See DECLARATION, MASTER AND SERVANT.)

burden of proof in case of collision, i. 166.

DRIVING, — continued.

- liabilities in case of, i. 101, 142 and n., 166; ii. 499, 522.
- of master and servant, ii. 406, 416.

DRUGGIST,

- a guarantor of his medicines, i. 129.

DRUNKENNESS,

- in case of slander, i. 243.
- assault, i. 195 and n.
- accusation of, i. 254, 301.

DURESS,

- conversion in case of, ii. 36, 43.

DWELLING-HOUSE,

- what is, ii. 18.
- unlawful entry upon, ii. 18.
- arrest in, ii. 20.
- distinction in case of felony and of misdemeanor, ii. 20.
- entry upon, by the owner, i. 193.
- an officer, i. 149, 151 n.; ii. 18, 221, 223 n.
- search-warrant, ii. 21, 155.
- habere facias*, ii. 24.
- injury to, i. 677; ii. 18.
- what will make a lawful entry in, a trespass *ab initio*, i. 114 and n.

E.**EARNEST, i. 559.****EASEMENT, i. 522 n.**

- possession of, i. 522 n.
- grant of, in highway, ii. 309.
- action for defective highway is not an action respecting an, ii. 383.
- action for abuse of, i. 122.
- by husband and wife for obstruction of, ii. 500.
- flowage, i. 640 n. (See *FLOWAGE*.)
- use of water is an, i. 647.

ECCLESIASTICAL COURTS,

- what is slander in, i. 242 n.

ECCLESIASTICAL PERSONS,

- waste in case of, ii. 95, 96.

EDITOR,

- slander, &c., of, i. 304 n.

EJECTMENT,

- by tenant in common, &c., ii. 232.
- joint parties in, ii. 238.

ELECTION, (See *VARIOUS ACTIONS*.)

- of remedies, i. 5, 9, 27 and n., 81, 187; ii. 261.
- in case of fraud, ii. 82.
- master and servant, ii. 406.

ELECTORAL FRANCHISE,

- violation of, i. 78 n.

ELECTRICITY,

not patentable, i. 687.

EMBLEMENTS, i. 497 n., 523 n.

EMINENT DOMAIN, (See **RAILROADS**.)

in case of nuisance, i. 581.

watercourse, i. 643 n.

ENCLOSURE,

with respect to possession, i. 550.

by watercourse, i. 550.

ENCYCLOPÆDIA,

copyright in, i. 713.

ENGINEER,

on railroad. (See **MASTER, RAILROAD**.)

ENGRAVINGS,

copyright in, i. 712, 715.

ENTICING AWAY OF WIFE, ii. 509.

declaration, ii. 509.

ENTRY, (See **ARREST, ATTACHMENT, DWELLING-HOUSE, EXECUTION, HOUSE, OFFICERS, SHOP**.)

in case of disseisin, i. 547, 552 n., 572.

upon part of property claimed, i. 533.

peaceable, i. 547; ii. 5.

constructive, ii. 5.

wrongful, whether necessary to trespass, ii. 5.

title justifies, ii. 14.

EQUITABLE WASTE, ii. 88, 90.

EQUITY,

jurisdiction of fraud, i. 29 n.

nuisance, i. 72 n., 583, 586, 604.

lights, i. 668.

patents, i. 703, 705.

watercourse, i. 623 n., 656.

copyright, i. 723.

trade-marks, i. 728.

waste, ii. 88, 99.

attorneys, ii. 478 n.

corporations, ii. 402 n.

EQUITY OF REDEMPTION,

attachment of, ii. 178 n.

EQUIVOCAL WORDS,

in slander, i. 246, 248.

ERECTING HOUSE,

waste, ii. 92.

ERRONEOUS JUDGMENT,

effect of, as to officer, ii. 129.

ESCAPE, ii. 106, 210. (See **RESCUE, DEBT, OFFICERS**.)

voluntary and negligent, ii. 212.

in case of *habeas corpus*, ii. 213.

action of debt for, ii. 214.

ESCAPE, — *continued.*

defences to action for, ii. 215.

and rescue, ii. 216 and n.

ESCROW,

action for tortiously recording, i. 57.

ESTOPPEL, i. 182. (See *IN PARI DELICTO.*)

in case of lights, i. 663, 668.

of officer to deny title attached by him, ii. 172.

impeach prior sale by himself, ii. 180 n.

by his own return, ii. 146.

receiptor, ii. 166.

by judgment, ii. 263 n.

ESTOVERS, ii. 89.

ESTRAY, (See *ANIMALS, IMPOUNDING, DISTRESS.*)

trespass *ab initio* by working an, i. 116.

ESTREPEMENT, (See *WASTE.*)

action of, ii. 96.

EVIDENCE, (See *ADMISSIONS AND DECLARATIONS, BURDEN OF PROOF, CHARACTER, EXPERTS, PRESUMPTIONS, and VARIOUS ACTIONS.*)

of adultery, ii. 508.

in case of assault, &c., i. 61, 197, 204.

patents, i. 681, 688, 694, 702, 709.

civil and criminal proceedings, i. 61 n.

actions, for a nuisance, i. 85.

fraud, ii. 82, 89.

by agent, i. 24.

for conspiracy, ii. 260.

action by officer for goods levied on, ii. 137.

negligence in serving process, ii. 131 n., 136, 140 n.

against officer for tortious levy, &c., ii. 135, 150, 151 n.

false return, ii. 149.

carrier, (See *BAILMENT.*)

for personal injuries, ii. 587.

bailee, ii. 532 n.

sheriff, for acts of deputy, ii. 154.

banks, for neglect in collecting notes, ii. 285.

attorney, for negligence, ii. 482 n.

concerning watercourse, i. 524 n.

against master for acts of servant, ii. 412.

for injury from defective highway, (See *HIGHWAY, TOWNS.*)

nuisance from a dog, and in defence for killing him, i. 590 n.

waste, ii. 100.

obstruction of lights, ii. 665.

slander, &c., (See *LIBEL, MITIGATION, DAMAGES, JUSTIFICATION, AGGRAVATION, REBUTTING, MALICE, GENERAL ISSUE.*)

malicious prosecution, i. 435, 441, 443, 449, 473 n., 478, 482.

arrest, i. 233 n., 236.

EVIDENCE, — continued.

in action for criminal conversation and seduction, i. 149 n.; ii. 507, 517.

(See SEDUCTION, HUSBAND, PARENT.)

in trespass *qu. cl.*, i. 519. (See TRESPASS.)

of title in such case, i. 535.

admissions, i. 519 n.

license, ii. 13 n.

to the person, ii. 25.

in trover, i. 553 n.

(See CONVERSION, DEMAND.)

of conversion, (See CONVERSION.)

title in trover for a note, i. 51.

in assumpsit against a carrier, i. 37.

of ownership, i. 553.

negligence, i. 129.

due care, i. 136.

under the general issue, i. 535.

on a plea of payment into court, i. 40 n.

EXCAVATION,

right of, i. 670.

in case of railroads, ii. 298.

distinction between injury to the soil and to a house upon it, i. 670.

adjoining wall, i. 673.

declaration, i. 132.

of soil supporting a building, i. 500.

damages for unlawful, i. 672.

EXCESS,

of violence — assault, i. 200.

in specification — patent, i. 698, 700.

EXCESSIVE,

damages for slander, &c., i. 430.

attachment, ii. 174.

EXCLUSION,

from court, ii. 117.

railroad train, ii. 325.

EXCLUSIVE POSSESSION,

trespass, i. 523 n.

EXCOMMUNICATION,

slander, &c., in sentence of, i. 291 n.

EXECUTION, (See CLERK, EVIDENCE, OFFICERS, RETURN, DEPUTY, PARTIES.)

in case of mortgage, ii. 618.

action by husband and wife for unlawful levy of, on her goods as his,

ii. 501 n.

malicious, i. 445.

a common-law process, ii. 186.

possession under, i. 570; ii. 198.

— sale of copyright, i. 723 n.

entry upon dwelling-house under, ii. 18, 24.

disseisin by levying, &c., i. 573.

EXECUTION, — *continued.*

seizure under, whether a conversion, ii. 44.

of privileged articles, ii. 127.

on void judgment, ii. 45.

— defendant, waste by, ii. 98.

how far a justification to an officer, ii. 122 n., 125, 135, 155, 189.

levy of, upon property attached, ii. 177, 192.

duty and liability of attorney as to, ii. 482, 491.

rights, &c., of officer in relation to, ii. 125, 178, 186,

defendant, ii. 197.

liability of officer for not levying, ii. 178.

money collected, ii. 194.

insufficient levy, ii. 190.

in case of transfer, ii. 191.

title on, i. 526.

assumpsit for money, &c., on illegal, i. 41 n.

trover for writ of, ii. 60.

return of, ii. 193.

mode of levy and instructions thereon, ii. 190.

second, &c., ii. 180.

against tenant in common, ii. 235.

EXECUTION SALE,

liability of defendant for false representations, i. 6.

of copyright, i. 723 n.

EXECUTOR,

and heir, rights of, to fixtures, i. 491.

cannot maintain an action for the seduction of testator's daughter, ii. 517.

EXECUTORY,

contract, will not support an action of tort, i. 3 n.

sale, possession in case of, i. 560,

EXEMPLARY DAMAGE, (See DAMAGES.)

in case of slander, &c., i. 429.

seduction, ii. 519.

EXEMPTION FROM ATTACHMENT, &c., ii. 186, 187.

EX JURE NATURÆ,

watercourse, i. 619 n.

EXPERIMENTS,

prior, will not defeat patent, i. 682.

EXPRESS,

malice, in case of privileged communication, i. 334 n., 335.

companies, whether common carriers, ii. 549 and n.

EXPULSION,

of member, liability of corporation for, ii. 280.

by railroads, of passengers, ii. 325.

EXTENSION,

of patent, i. 701.

EXTENT,

action for maliciously obtaining a writ of, i. 475 n.

EXTRAORDINARY CARE, (See NEGLIGENCE.)

in the case of loan, ii. 528.

F.

FACTOR, (See CONSIGNEE.)

- conversion by, ii. 39.
- action on the case against, ii. 451.
- waiving the tort against, ii. 450 n.

FALSE,

- representation in sales, ii. 78.
 - by defendant in execution, i. 6.
 - scienter*, ii. 75 n.
 - materiality of, ii. 81 n.
 - by infant, that he is of full age, does not estop him, ii. 524.
 - case for, i. 4.
 - when damage must be proved, i. 100.
 - (See DECEIT, EVIDENCE, FRAUD.)
- recommendation, i. 9, 20 and n., 30, 97, 100; ii. 84.
- disparagement, i. 85.
- return, i. 76. (See OFFICERS, ATTACHMENT, EXECUTION, RETURN.)
 - damages, ii. 181.
 - evidence, ii. 149.
 - of election, case for, ii. 224.
- swearing, charge of, i. 391, 399.
- warranty, and case for, i. 5; ii. 78.
- imprisonment, i. 208; ii. 109, 111, 114.
 - (See DAMAGES, MALICIOUS ARREST.)
 - definition of, i. 208.
 - in case of corporation, ii. 274.
 - as affected by American constitutions, i. 208 n.
 - what is an arrest, i. 210.
 - form of action for, i. 212.
 - pleading and evidence in, i. 218 n.; ii. 491.
 - de injuriâ sua*, &c., i. 218 n.
 - malice, i. 214.
 - continuando*, i. 213.
 - defence or justification, i. 212, 215; ii. 212.
 - conviction, ii. 116.
 - legal process — officers and parties, . 215.
 - persons privileged from arrest, i. 219.
 - arrest by officers without process, i. 220, 224.
 - by private persons, i. 203 n., 220, 221 n., 224,
 - on suspicion, i. 228.
 - and malicious prosecution — distinction, i. 435, 441.
 - and malicious arrest, i. 232.
 - liability for attorney for, ii. 490.

FARES,

- rights of railroads in respect to, ii. 325.

FARM,

- waste in, ii. 91.

FARRIER,

- action against, for refusing to shoe a horse, i. 133.

FEES,

attorney's — how far dependent on his diligence, ii. 487.

FEIGNED ISSUE,

in patent cases, i. 711.

FELLING OF TIMBER. (See **TIMBER, WASTE.**)**FELONY,**

and misdemeanor, arrest for, ii. 20.

resistance of, assault, i. 204.

FEME COVERT. (See **HUSBAND.**)**FENCES,** i, 594 n.; ii. 234 n.

and cattle, i. 508.

in case of railroads, ii. 335.

on highways, i. 607; ii. 367.

FERÆ NATURÆ,

animals, i. 504.

FERRY, i. 69, 677; ii. 431. (See **BAILMENT, COMMON CARRIERS.**)**FIELD-DRIVER,** i. 508, 513.**FIGHT,**

separating a, no assault, i. 192.

FIGURATIVE LANGUAGE,

in slander, &c., i. 292.

FIRE,

responsibility for setting, i. 101, 109, 118 n., 120, 130.

right to destroy property to prevent the spreading of, i. 153 n.

liability of carrier in case of, ii. 571, 576 n., 577 n.

innkeeper, ii. 534.

FISH,

property in, i. 580.

FISHERY, i. 70.**FIXTURES,** i, 472; ii. 3 n.

trover for, i. 491 n.; ii. 58 n.

rights of executor and heir as to, i. 491.

buildings as, i. 491, 494, 536.

domestic articles as, i. 491.

waste as to, ii. 92 n.

trespass to, i. 491 n.; ii. 3 n.

FLAP,

of cellar-door, unsafe, i. 538.

FLOTSAM, i. 498.**FLOWAGE,** i. 77, 613 and n., 634, 640.

(See **DAMAGES, WATERCOURSE.**)

FORCES,

in patents, i. 683, 687.

FORCIBLE ENTRY,

in case of landlord, ii. 605.

FOREIGNERS,

rights of, as to patents, i. 679, 711.

copyrights, i. 719 n.

FOREIGN

language, libel, &c., in, i. 250.

FOREIGN, — *continued.*

patent, i. 679.

FORFEITURE, (See WASTE.)

for waste, waiver of, ii. 90.

FORGERY,

charge of — slander, &c., i. 261, 277.

FORM AND PRINCIPLE

of machine in case of patent, i. 684.

FORMER RECOVERY, i. 47.**FORMS OF ACTION,**

(See **THEIR NAMES AND THE VARIOUS INJURIES.**)

FORNICATION,

charge of — slander, &c., i. 247, 278, 301, 320, 386, 430.

FORWARDING AGENTS, ii. 556.**FOURTH OF JULY,**

service of process on, ii. 129 n.

FOX-HUNTING,

whether actionable, i. 590 n.

FRANCHISE,

electoral, i. 78 n.

FRAUD, ii. 73. (See DAMAGES, DEMURRER, ELECTION, RESCINDING.)

is good cause of action, ii. 73.

connects contract with tort, i. 3 n.; ii. 73.

cannot consist of a mere promise, ii. 75 n.

effect of, on contracts, i. 3 n., 7, 58.

moral and legal, i. 9 n.

must be active, i. 9 n.

connected with contract, ii. 73.

general principles; what constitutes an actionable fraud, ii. 73, 78, 82 n.

constructive, ii. 73, 79.

misrepresentation of boundaries, title, &c., ii. 78.

in case of gift, ii. 78.

by creditor, ii. 79.

intent not to pay, ii. 80.

whether creditors and subsequent purchasers are affected by, ii. 80.

when a seller loses his right of action, ii. 81.

waiver and acquiescence, ii. 81.

false recommendation of credit, &c., i. 9 and n., 20, 30, 80 n., 97; ii. 84.

action for, i. 3 n.

in obtaining note, i. 3 n.

preventing a mortgagor from redeeming, i. 4 n.

upon a surety, i. 4 n.

in sale, i. 4; ii. 78.

obtaining written agreement, i. 7.

compromise, i. 11 n., 18 n.

of agent, i. 7 n., 23.

in transfer of note, i. 12.

of purchaser, effect on sale, i. 18, 23; ii. 79.

FRAUD, — *continued.*

- of purchaser, whether an action lies for, i. 18 n.
- equity jurisdiction of, i. 30 n.
- charge of — slander, &c., i. 275, 384.
- conversion in case of, ii. 36.
- of officer, evidence of, ii. 124 n.
- a question for the jury, i. 95 n.
- in case of partners, ii. 271.
 - corporation, ii. 277.
 - agents, &c., of corporation, ii. 277, 278, 288.
- action for, by mortgagee, ii. 615.
- of wife, ii. 505.
 - agent, liability for, ii. 440, 442, 446.
 - infant, ii. 524.

(And see DECEIT, EVIDENCE, FALSE REPRESENTATIONS, &c., FRAUD-
ULENT, &c.)

FRAUDULENT,

- claim to dissolve attachment, ii. 76.
- concealment, i. 7.
- warranty, i. 5; ii. 78.
- conspiracy, ii. 257.
- sale by partners, ii. 271 n.
- certificates of stock, i. 17; ii. 278. (And see FRAUD.)

FREEDOM OF SPEECH,

- constitutional protection of, i. 334 n.

FRIENDLY SOCIETY, ii. 229.**FROST,**

- defect in highway by, ii. 366.

G.**GAME, i. 482, 507.****GAMING,**

- contracts, i. 58.

GAMING-HOUSE,

- charge of keeping — libel, i. 252.

GARNISHMENT,

- liability of officer in case of, ii. 164.

GAS COMPANY,

- nuisance by, i. 582 n., 585 n.

GAZETTEER,

- copyright in, i. 713.

GENERAL SUSPICION,

- no defence to action for malicious prosecution, i. 455.

GIFT,

- constructive transfer of possession by, i. 555 n.

GLEBE LAND,

- possession of, i. 534.
- waste and dilapidation of, ii. 96.

GOOD-HUSBANDRY,

waste in connection with, ii. 91.

GOODS SOLD, &c. (See **WAIVER.**)

action for, in case of tort, i. 44.

GRAMMARS,

copyright in, i. 713.

GRAND JURY,

certificate of justice of the peace to, privilege, i. 357.

GRASS, i. 501, 523.**GRATIS DICTUM**

creates no liability, i. 23 n.

GRATUITOUS AGENT, ii. 451.**GRAVEL,**

the subject of waste, ii. 91.

GROSS NEGLIGENCE, i. 129, 135 n.; ii. 389. (See **NEGLIGENCE.**)

of plaintiff, what is, i. 135 n.

defendant, where the plaintiff was in fault, i. 137.

officer, ii. 124 n.

innkeeper, ii. 533 n.

guest ii. 539.

physician, &c., i. 130, 239.

GROWING TREES, i. 496.**GUARANTY,**

fraud in obtaining, i. 10 n.

GUARDIAN,

conversion by, ii. 39.

action for waste against, ii. 96.

GUARDS,

to be provided on highway, ii. 367.

GUEST,

and boarder, distinction, ii. 534, 542.

gross negligence of, ii. 539.

GUIDE-BOOKS,

copyright in, i. 713, 719 n.

GUN,

false warranty as to safety of, i. 12.

care of, what is sufficient, i. 127.

GUNPOWDER,

keeping of, i. 72.

GUTTER,

obstructing, i. 640 n.

H.**HABEAS CORPUS,**

in general, i. 210 n.

case of husband and wife, ii. 506.

act of New York, construed, ii. 103 n.

action for obtaining writ of, without authority, i. 438.

escape in case of, ii. 213.

HABERE FACIAS,

entry upon dwelling-house under, ii. 24.

no protection as to prior trespass, ii. 129 n.

HANDCUFFING, i. 223.*HANDWRITING,*

in case of libel, i. 421.

HARBORING OF WIFE, ii. 510.*HAY-RICK,*

negligence in making, i. 129.

HEALTH,

injuries to, i. 238.

HEARSAY,

slander by, i. 415.

HEIR AND EXECUTOR,

rights of, as to fixtures, i. 491.

HEREDITAMENT, i. 489.*HERMAPHRODITE,*

charge of being a, i. 280.

HIGH TREASON,

charge of, i. 259 n.

HIGHWAY. (See *EVIDENCE, TOWNS.*)

action against officers of, ii. 221.

rights, &c., of railways in respect to, ii. 300. (See *HORSE RAILROADS.*)

use of, for driving, &c., ii. 308.

HIRING,

contract of, ii. 529.

HOLDING OVER,

tortious, i. 25.

HONESTY,

charge of breach of, i. 259.

HORSE,

declaration for injury from, i. 132.

lien of innkeeper on, ii. 542.

livery-stable keeper has no lien on, ii. 543 n.

responsibility of innkeeper for, ii. 537.

conversion of, by misuse, ii. 33.

HORSE RAILROADS, ii. 303.

Ch. J. Shaw's judgment in *Commonwealth v. Temple*, ii. 306.

HOYMEN,

are common carriers, ii. 546 n.

for what liable, ii. 567.

HUE AND CRY, ii. 154.*HUSBAND.* (See *HABEAS CORPUS, WASTE, ADULTERY, SEDUCTION.*)

and wife — waste, in case of, ii. 93.

slander, &c., in case of, i. 320, 394 n.; ii. 499, 500, 502, 505.

malicious prosecution in case of, ii. 499.

torts connected with relation of, ii. 498.

nuisance, i. 600.

assault, i. 206 n.; ii. 504, 506.

HUSBAND, — *continued.*

- action by, detinue, ii. 502.
- against husband and wife, ii. 503.
- by wife, ii. 499 n., 502.
- mutual personal rights of husband and wife, ii. 506.
 - corporal punishment by husband, ii. 506.
 - cruelty — what will justify a desertion, ii. 506 n.
- action for seduction, &c., ii. 506.
 - collusion of husband, ii. 508. (See **DAMAGES.**)
 - in case of separation, ii. 508, 509.
- enticing away and harboring wife, ii. 509.

HUSBANDRY,

- good — in case of alleged waste, ii. 91.

I.**ICE,**

- cutting of, i. 657 n.

IGNORANCE,

- charge of, against professional men, i. 303.
- action against judicial officers for gross, ii. 118.
- of law, in case of malicious prosecution, i. 453, 455 n., 458.

ILLEGAL

- business, slander in case of, i. 294.
- contracts, i. 58.

ILLEGALITY,

- whether an action lies in case of, i. 172.

IMITATION

- of trade-marks, i. 727. (See **TRADE-MARKS.**)

IMMEDIATE. (See CAUSA PROXIMA.)

- and remote cause of injury, ii. 568.

IMMORAL CONTRACTS, i. 58.**IMPLEMENTS**

- of trade, as fixtures, i. 491.

IMPLIED

- damages, in case of watercourse, i. 627.
- malice, in slander, i. 363. (See **MALICE.**)
- warranty. (See **FRAUD, WARRANTY.**)
- in gift, ii. 78.

IMPOUNDING, i. 508, 511.**IMPRESSMENT, ii. 222.****IMPRISONMENT. (See FALSE IMPRISONMENT.)**

- what, i. 208.
- continuance of, i. 213.

IMPROVEMENT,

- patent for, i. 680, 690, 696, 700, 708.
- infringement of, damages for, i. 708.

INCEST, i. 279 n.**INCONTINENCY,**

- accusation of, i. 279 n., 301.

INCORPOREAL PROPERTY, i. 489.

injuries to, i. 612, 613.

possession of, i. 518, 522 n.

INDECENT ASSAULT, i. 194 n. 195 n.**INDEMNITY,**

implied promise of, in case of master and servant, ii. 471.

of officer, for wrongful act, ii. 170, 179.

in case of attorney, ii. 496 n.

INDICTABLE OFFENCE,

words imputing, i. 259. (See **LIBEL**, &c.)

INDICTMENT

for slander, i. 242 n. (See **MALICIOUS PROSECUTION**.)

for establishing a nuisance, i. 584 n., 608 n., 610.

conspiracy, ii. 256.

non-repair, and civil action, i. 70.

resisting and obstructing an officer, ii. 139 n.

copy of — malicious prosecution, i. 481 and n.

as evidence, i. 60 n.

INDIRECT ASSERTION,

whether slanderous, i. 246.

INDUCEMENT,

in declaration for slander, &c., i. 379.

INFANTS. (See **RESCINDING.)**

liability of, ii. 523.

fraud, ii. 524.

conversion, ii. 33, 63, 523.

contracts, ii. 524.

false warranty, ii. 524.

at what age they are liable for negligence, ii. 523 n.

not liable for deceit or by estoppel in representing themselves of age, ii. 524.

rescission of contracts in case of, ii. 64, 524.

INFRINGEMENT OF PATENT, i. 690, 703, 707.

form of action for, i. 694 n., 703. (See **PLEADING**.)

parties in action for, i. 702.

INJUNCTION,

action for maliciously suing out, i. 445 n., 472.

against waste, ii. 90, 99, 100, 614.

in case of mortgage, ii. 614.

abuse of corporate charter, i. 579.

in case of watercourse, i. 656.

patent, i. 705.

copyright, i. 716, 723.

trade-marks, i. 728.

nuisance, i. 71, 577, 586, 604, 609 n.

obstruction of lights, i. 668.

excavation, i. 672.

trespass, i. 576 n.

INJURIA, i. 73 n.

sine damno, i. 76 n.

INJURIES. (See RAILWAYS, TORTS, TROVER, TRESPASS, WASTE, &c.)

public and private, i. 1.

remote, i. 82 n., 92, 117, 206.

in the exercise of legal rights, i. 103.

case of master and servant. (See MASTER AND SERVANT.)

what the injury must be, ii. 408.

must be shown to be the effect of defendant's conduct, i. 82.

various sorts of, by *nonfeasance*, *misfeasance* or *malfeasance*, to things in

possession and things in action, i. 1, 487.

to relative rights, ii. 101.

from defect in highway. (See TOWNS.)

to character, i. 241, 433.

and property, i. 433 and n.

to property — general nature, &c., of such injuries, i. 487.

classification of, i. 487. (See PROPERTY.)

property, partly real and partly personal,
i. 489.

fixtures, i. 490. (See WASTE.)

building on another's land, i. 492.

trees, &c., i. 495.

(See DAMAGES, WASTE.)

movable property found upon land, i. 498.

mines, i. 121, 161, 498, 523 n.; ii. 91.

(See WASTE.)

pews, i. 500.

effect upon title of separation from land,
i. 501.

title by *accession* and *confusion*, i. 501.

animals; distress, impounding, &c., i. 102,
104, 151, 504, 593 n.

trespas and case, i. 507. (See DOG.)

to trade or business, i. 71.

health, i. 238.

miscellaneous, to buildings, i. 677.

by animals, i. 138 n., 590.

to child, i. 157; ii. 521.

INJURY AND ACTION,

compared, i. 487.

IN MITIORI SENSU,

construction of words, i. 290.

INN,

what is, ii. 534.

trespas *ab initio* by refusing to leave, i. 113 n.

INNKEEPER, ii. 529. (See BAILMENT, IN PARI DELICTO, ANIMALS, GUEST, BOARDER.)

rights of, i. 113.

INNUENDO. (See LIBEL, PLEADING, DECLARATION, COLLOQUIUM.)

purpose of, i. 382.

effect, i. 383.

INNUENDO, — *continued*.

when it may be rejected as surplusage, i. 388, 389.

and *colloquium*, i. 389.

IN PARI CAUSA POSSESSOR, &c., i. 521 n.

IN PARI DELICTO, i. 134, 189; ii. 74, 81, 133.

(See *CARE*, *NEGLIGENCE*.)

in case of highway, ii. 371.

injury by plaintiff to defendant's property — defendant must show title, i. 171.

fraud, ii. 81.

master and servant, ii. 419.

license, i. 178.

seduction, i. 149; ii. 516.

injury to child, i. 157.

innkeeper, ii. 533.

illegal transactions, i. 172.

work done on Sunday, i. 173.

illegal sale, i. 173.

compounding of crime, i. 174.

smuggling, i. 174.

counterfeiting, i. 175.

rights of property protected, i. 176.

liquors, i. 176.

license, authority, sanction, i. 178.

revocation of, i. 181.

estoppel, i. 182.

sales, i. 182.

acknowledgment of title, i. 184 n.

acquiescence, i. 185.

waiver, i. 186.

submission to reference, i. 186.

estoppel — waiver of payments after notice, i. 187.

election of remedies, i. 187.

carrier, i. 156; ii. 567 n., 591, 595.

railroads, ii. 330, 345.

slander, &c., i. 243, 294.

exceptions to the rule, i. 165.

in case of railroad, i. 156, 160 n.

where plaintiff's negligence is caused by defendant's fault, i. 170.

usury, i. 177.

general qualifications, i. 154.

policy of the law, i. 156.

mines, i. 161.

plaintiff's wrong must be immediately connected with the subject of the action, i. 165.

undivided responsibility, i. 165 n.

separate transactions, i. 169.

burden of proof, i. 136, 143.

INQUISITION, (See EXTENT.)

action for maliciously procuring, i. 474 n.

INSANITY,

in case of slander, &c., i. 243.

INSPECTOR,

of votes, liability of, ii. 109.

INSUFFICIENT BAIL, ii. 208.**INSULTUS, i. 190.****INSURER,**

innkeeper, whether an, ii. 533.

carrier as an, ii. 567.

of life, has no right of action for killing the insured, i. 87 n.

INTENT, (See SCIENTER, TORTS, MALICE.)

to commit a crime, charge of, i. 254.

as involved in a tort, i. 3 n., 95.

when it must be shown, i. 9, 15. (See SCIENTER.)

in trespass, i. 97; ii. 7 n., 17, 25.

replevin, i. 96.

trover, ii. 28, 40.

slander, i. 242, 272, 401.

case of fraud, i. 97; ii. 73, 80, 84.

obstruction of lights, i. 97.

assault, i. 193, 195.

case of negligence, i. 101.

determines the form of action, i. 102.

to defraud, in ancient declarations in assumpsit, i. 3 n.

INTEREST, (See USURY.)

usurious, ii. 36 n.

on money, collected by officer, ii. 195.

as damages in trover, ii. 69.

INTERMEDIATE SERVANTS,

rights and liabilities of, ii. 443, 450 n.

INTOXICATION,

in case of assault, i. 195 and n.

INTRUDER, assault upon, i. 199.**INVENTION, (See PATENT.)**

joint, i. 690.

assignment of, i. 702.

dedication of, i. 684, 697 n.

IRONICAL LANGUAGE,

in libel, &c., i. 248, 292.

IRREGULARITY,

of attachment not actionable, i. 444 n.

rights, &c., of officer, in case of, ii. 129, 213.

of proceedings, remedy for, against magistrate, i. 107.

prosecution, i. 471.

IRREPARABLE INJURY,

injunction to stay, i. 576 n.

in case of waste, ii. 99.

IRRESISTIBLE FORCE,

in case of bailment, ii. 530 n.

IRRIGATION,

right of, i. 630.

J.**JACOBITE,**

accusation of being a, i. 299.

JAILER,

action on the case against, for escape, ii. 212 n.

JEST,

words spoken in — slander, i. 242.

JOINDER,

of parties. (See **JOINT TORTS, JOINT PARTIES.**)

counts against a carrier, i. 37.

in slander, &c., i. 379 and n.

trespass and case, i. 107 n.

of trespass *qu. cl.*, and *de bonis asportatis*, ii. 2 n.

and assault, ii. 2 n.

trespass *per quod servitium*, and count for breaking and entering the house, ii. 517.

JOINT DAMAGE, ii. 237.**JOINT INVENTION,**

patent for, i. 690.

JOINT LIABILITY,

in tort and contract, i. 34. (See **JOINT TORTS.**)

of sheriff and deputy, ii. 151.

party and officer, ii. 253.

husband and wife for waste, ii. 95.

master and servant, ii. 405.

(See **CORPORATIONS, MASTER, AND SERVANT.**)

owners of dogs doing joint damage, ii. 268 n.

keeper and owner of dog, ii. 269 n.

JOINT PARTIES,

(See **HUSBAND, JOINT TORTS, NONJOINDER.**)

in case of libel, &c., i. 318 ; ii. 502.

false return, ii. 238.

malicious prosecution, i. 440 ; ii. 238.

in contract, i. 37.

ejectment, ii. 238.

JOINT POSSESSION, i. 530.**JOINT-STOCK BANK, ii. 290.**

rights of partners, ii. 290.

JOINT TENANTS,

actions by and between. (See **JOINT TORTS.**)

JOINT TORTS,

or wrongs, ii. 226, 242, 397, 503. (See **JUDGMENT.**)

JOINT TORTS, — *continued.*

mutual rights and liabilities of parties jointly interested as between themselves and in reference to others, i. 188 n.; ii. 226.

suit of one joint-owner against another; sale or destruction of the property, ii. 227.

members of a voluntary association, ii. 229, 401 n. (See CORPORATIONS.)

master and servant, ii. 405.

individuals acting under statute, ii. 397.

tenants in common of real property, ii. 230.

(See ENTRY, TENANTS IN COMMON.)

third person claiming under one tenant in common, ii. 234.

creditors, ii. 235 n.

suits by and against joint parties against or in favor of third persons, ii. 236, and n. (See PLEADING.)

where no joinder is necessary, ii. 240.

the joinder is elective, ii. 237, 261.

defendants — suits in general, ii. 242.

case of joint trespass, ii. 242.

assault, ii. 242 n.

conversion, ii. 245.

fraud, ii. 246.

question of joint liability for the jury, ii. 246, 251.

mistake of one party, ii. 251.

contract between parties, ii. 251.

conspiracy, ii. 256. (See CONSPIRACY.)

election of remedies; several suits, ii. 261, 406.

verdict, ii. 264, 267, 269.

damages, ii. 264, 267.

costs, &c., ii. 262, 268.

judgment, ii. 263. (See JUDGMENT.)

severance, ii. 262.

JUDGE. (See JUDICIAL OFFICERS.)

libel upon, i. 299 n.

corruption of, ii. 102.

suit against, i. 436.

JUDGMENT. (See VARIOUS TORTS AND ACTIONS.)

no bar to an action of deceit in the contract on which rendered, i. 4 n.

payment under, whether conclusive, i. 47 n.

in tort, a bar to an action on the promise, i. 47.

effect of, on title, i. 524.

when a bar in joint torts. (See JOINT TORTS.)

in trespass, ii. 11 n.

arrest after payment of. (See ARREST, FALSE, &c.)

admissibility as evidence, i. 533 n.

trover for, ii. 59.

a defence in trover for goods taken under process, ii. 45.

in detinue, effect of, i. 48.

erroneous, effect of, as to officer, ii. 129, 213.

whether an officer must show a, ii. 136, 138 n., 189.

JUDGMENT, — *continued*.

- in action of assault, i. 206.
- and contract, i. 47.
- void, execution on, ii. 45.
- payment of, by a joint party, ii. 264 n.

JUDICIAL NOTICE, of statute, i. 379 n.**JUDICIAL OFFICERS**. (See **JUSTICE OF THE PEACE**.)

- who are, ii. 101.
- liability of, ii. 101.
- opinion of Ch. J. Shaw, ii. 102.
- Ch. J. Kent, ii. 104 n.
- bankrupt commissioners, ii. 109.
- judge in foreign country, ii. 109.
- inspector of votes, ii. 109.
- vicar-general of bishop, ii. 109.
- steward of a court baron, ii. 109.
- assessors, ii. 219.
- magistrates and justices of the peace, ii. 110.
- judicial* duties and acts, ii. 110.
- ministerial* duties and acts, ii. 112.
- under unconstitutional statutes, ii. 113.
- want of jurisdiction, ii. 113.
- want of jurisdiction of, in general, ii. 119.
- quasi* judicial acts, ii. 118.
- malice, &c., i. 120.

JURISDICTION. (See **OFFICERS**, **JUDICIAL OFFICERS**.)

- of action of slander, &c., i. 258.
- court, necessary to perjury, i. 269.
- protection of officer, ii. 125.
- whether material in action for malicious prosecution, i. 444 n.
- justice of the peace, i. 535 n.; ii. 113.
- inferior court, how far a protection, ii. 113, 119, 124, 130.

JUROR,

- libel upon, i. 300.

JURY.

- province of court and, in action for malicious prosecution, i. 442, 450 n., 460, 472.
- in action for injury from defective highway, ii. 363, 376.
- against officers, ii. 140.
- in case of slander, &c. (See **LIBEL**, &c.)
- malice, i. 332.
- trespass, ii. 2 n.
- fraud, ii. 74 n., 81 n., 86.
- waste, ii. 92.
- seduction, ii. 512 n.
- questions of possession, i. 569.
- estoppel, i. 183.
- patent, i. 680, 683, 698, 700, 709.
- copyright, i. 715.

JURY, — *continued*.

- questions of assault, i. 191 n., 200.
 - intent, i. 95, 100, 193, 332, 442; ii. 231.
 - usage, ii. 586 n.
 - diligence in sheriff, ii. 132 n.
 - attorney, ii. 481.
 - bailee, ii. 527.
 - and negligence in other cases, i. 125, 130 n., 137, 139, 159.
 - in pari delicto*, i. 162.
 - joint liability, ii. 246, 251.
 - conspiracy, ii. 260.
 - authority of agents, &c., of a bank, ii. 290.
 - servant, ii. 412 n.
 - obstruction of way, ii. 374.
 - as to common carrier, ii. 545 n.
 - delivery to carrier, ii. 553.
 - province of court and, in questions of termination of liability as carrier, ii. 565.
 - other cases of carrier, ii. 576 n., 580.
 - probable cause, in malicious arrest, i. 237.
 - negligence of surgeon, i. 240.
 - nuisance, i. 590.
 - value, i. 591 n.
 - reasonable use of watercourse, i. 629, 632.

JUS TERTII,

- defence of, i. 543. .

JUSTICE OF THE PEACE. (See JUDICIAL OFFICERS, JURISDICTION.)

- jurisdiction of, i. 535 n.; ii. 110.
- action against, for conspiracy to arrest, i. 440.
- arrest by, i. 222 n.
- may reasonably exclude persons from the court-room, ii. 117.
- libel upon, i. 299.
- his certificate to grand jury privileged, i. 357.
- in case of malice, ii. 120 n.
- in reference to bail, ii. 114.

JUSTIFICATION,

- of libel, &c., i. 395.
- (See EVIDENCE, FALSE IMPRISONMENT, OFFICER, PRIVILEGED COMMUNICATION.)
- truth in, i. 396 n.
- what evidence will sustain it, i. 400, 404, 419 n.
- burden of proof, i. 321 n., 369, 398.

K.**KEEPER.** (See FIELD-DRIVER.)

- of animals at large, i. 508 n.
- goods attached, ii. 163, 166 n.

KENT, C. J.,

opinion of, as to liability of judicial officers, ii. 103 n.

KNAVE,

charge of being a, i. 276 n.

L.**LABELS.** (See **TRADE-MARKS.**)**LAMP-POST,**

possession of, i. 543 n.

LAND, i. 489.

liability of owners for injuries from work done thereon. (See **MASTER.**)

LANDLORD. (See **RENT.**)

and tenant, rights and duties of, as to lights, i. 665, 669; ii. 607.
crops, ii. 605.

torts in case of, ii. 603.

whether liable for acts of each other, ii. 607.

concurrent right of action, ii. 603.

actions by, against third persons, ii. 603.

tenant against landlord, ii. 605.

landlord against tenant, ii. 609.

third person against landlord or tenant, ii. 607.

for various nuisances, ii. 607.

action by landlord against third persons, ii. 610.

when liable for nuisance erected by tenant, i. 122.

LARCENY,

accusation of, i. 271, 286, 387, 431.

declaration, proof, &c., i. 391, 407, 414 n.

LATENT DEFECTS, i. 13 n.**LAW AND FACT.** (See **JURY.**)**LAW OF THE ROAD,** i. 93; ii. 308.

(See **HIGHWAY.**)

in case of defective highway, ii. 377 n.

LAW REPORTS,

copyright in, i. 716.

LEASE,

trover for, i. 57.

for immoral purposes, i. 58.

possession in case of, i. 523 n.

waste in case of, ii. 88, 90, 95.

LEAVE AND LICENSE,

plea of, i. 181.

LEGAL ADVICE,

a privileged communication. (See **LIBEL, PRIVILEGED, &c.**)

LEGAL AND MORAL FRAUD, i. 9 n.**LEGAL PROCESS,**

conversion in case of. (See **CONVERSION.**)

abuse of, ii. 21 n.

battery under, i. 198 n., 200 n.

LESSOR. (See **LANDLORD.**)

LETTER,

- copyright in, i. 725.
- libel by, i. 312.

LETTERS-PATENT,

- trover for, ii. 59.

LEVY. (See ATTACHMENT, EXECUTION.)

LEX LOCI,

- in case of slander, i. 258.

LIABILITY. (See VARIOUS OFFICERS AND TORTS.)

- several, of joint wrong-doers, i. 2, 34.

LIAR,

- charge of being a, i. 276.

LIBEL AND SLANDER, i. 241.

(See COLLOQUIUM, INNUENDO, IN PARI DELICTO, JOINDER, LEX LOCI.)

- definition of slander, i. 242.

- various kinds of, i. 242.

- whether indictable, i. 242 n.

- what is in ecclesiastical courts, i. 242 n.

- intent to slander, i. 242.

- various defences, i. 242.

- mistake, i. 245.

- indirect charge, i. 246, 249, 261.

- against an individual, made in form against a class, i. 317.

- caricatures, i. 247 n.

- words in foreign language, i. 250, 314.

- obscene words, i. 250.

- distinction between libel and slander, i. 241, 251.

- definition of libel, i. 251.

- instances of libel, i. 251.

- ridicule, i. 251.

- libel of dead persons, i. 252.

- slander — accusation of crime, i. 253, 362, 433 n.

- (See VARIOUS CRIMES.)

- when crime is impossible, i. 260.

- untechnical description of crime, i. 261.

- as affected by the *lex loci*, i. 258.

- when prosecution barred by statute of limitations,
i. 406 n.

- special damage, i. 246, 254.

- loss of marriage, i. 256.

- place of uttering, i. 257.

- charge of perjury, i. 262, 286, 292, 431. (See PERJURY.)

- false swearing, i. 249, 263, 266.

- materiality of the evidence, i. 267.

- jurisdiction of court, i. 269.

- procuring abortion, i. 292.

- larceny, i. 271, 286, 387, 431.

- drunkenness, i. 301.

LIBEL AND SLANDER, — *continued.*

- slander, charge of fraud, &c., i. 275, 384.
 - sodomy, i. 292.
 - forgery, 261, 278. (See FORGERY.)
 - passing counterfeit money, i. 278.
 - clipping money, i. 247, 278.
 - poisoning. (See POISONING.)
 - murder. (See MURDER.)
 - high treason. (See TREASON.)
 - various crimes, misdemeanors, &c., i. 260 n.
 - arson, i. 262.
 - suspicion of felony, i. 287.
 - want of chastity. (See CHASTITY.)
 - bribery, i. 299.
 - disease, i. 280, 282.
- construction of, i. 251, 283, 325, 373. (See CONSTRUCTION.)
 - province of the court and jury, i. 283, 286, 297, 300, 326, 332, 336, 355, 362 n., 372, 383, 390, 392 n., 408, 425, 430.
 - slang phrases, &c., i. 286.
 - evidence, i. 288.
 - intendment of hearers, i. 242, 289, 316.
 - (See IN MITIORI SENSU.)
- relating to employments, &c., i. 306.
 - illegal occupation, i. 294.
 - declaration in such case, i. 294.
- slander of public officers, &c., i. 298, 356. (See VARIOUS OFFICES.)
 - ambassador, i. 374.
 - archbishop, i. 299.
 - attorneys, i. 303, 420.
 - administrator, i. 304.
 - physicians, i. 296, 304.
 - apothecary, i. 305.
 - trade, &c., i. 306, 319.
 - (See also VARIOUS TRADES AND OCCUPATIONS.)
 - credit, i. 306.
 - value of property, i. 359 n.
- publication, i. 311, 321.
 - proof thereof, i. 311, 421.
 - by letter, i. 312.
 - confidence and injunction of secrecy, i. 314.
- action for, is a penal action, i. 242 n. (See LIMITATIONS.)
 - does not survive, i. 324.
 - locality of, i. 257.
- parties, i. 315, 390 n., 391; ii. 499.
 - class of persons, i. 317.
 - waiver of objections to, i. 318.
 - publisher of newspaper, i. 321.
 - agency in case of libel, i. 321.

LIBEL AND SLANDER, — *continued.*

parties, innuendo, &c., as to, i. 316.

joint parties, ii. 502.

conspiracy, i. 319.

action by husband and wife for, i. 320 ; ii. 500, 502.

against husband and wife for, i. 321 n. ; ii. 505.

corporation, i. 319.

partners, i. 319.

malice, i. 283 n., 325, 363, 366, 369, 411 n. (See MALICE.)

what is, i. 325.

implied, i. 326, 348.

drunkenness, i. 243.

privileged communications, i. 270, 326, 334.

(See PRIVILEGED COMMUNICATION.)

in churches, i. 291 n., 345.

reports of courts, i. 335, 357.

(See REPORTS.)

proceedings in courts, i. 335.

accusation of crime, i. 362.

criticism, i. 356, 358.

petitioners, i. 351.

express malice, i. 334 n., 335.

candidates, i. 298, 356.

legal advice, i. 362.

business matters, i. 364.

in case of perjury, i. 270.

bill in equity, i. 319.

character of servant, i. 369.

official certificates, i. 357.

bona fides, i. 371.

pleading in, (See ALLEGATION, DECLARATION, DEMURRER, JURISDICTION, PLEADING.)

Code of New York, i. 395 n., 396 n.

counts, i. 379, 381, 432.

innuendo, i. 382. (See INNUENDO.)

colloquium, i. 389. (See COLLOQUIUM, TRADE.)

justification — truth, i. 263, 270, 279 n., 331, 395.

(See JUSTIFICATION.)

in case of perjury, i. 263, 270.

burden of proof, i. 321 n., 369, 399.

repetition of slander, i. 329, 404 n., 410, 415.

burden of proof, i. 410.

words retracted, i. 244.

evidence, i. 311, 416. (See EVIDENCE, LIMITATIONS.)

admissions and declarations, i. 396 n., 428.

damages, verdict, and judgment, i. 429. (See DAMAGES, DEFAULT.)

contribution in case of, i. 189.

LIBELLER,

charge of being a, i. 252.

LIBELLOUS

and immoral pictures, i. 58.

LIBERTY,

personal, right of, i. 208.

LIBERUM TENEMENTUM, i. 489; ii. 11 n.

LICENSE, ii. 13. (See EVIDENCE, POSSESSION, TRESPASS.)

in case of trespass *quare clausum*, ii. 13, 15, 18 n.

ab initio, i. 113.

law and in fact, ii. 15.

rule of *in pari*, &c., in case of, i. 178.

to build dam, i. 636, 637.

revocation of, i. 181, 637.

abuse of, i. 181.

end of, i. 181.

to use patent, i. 700.

perform a dramatic composition, i. 717 n.

LICENSED

drayman, injury in case of, ii. 438.

drover, ii. 438.

LIEN, (See ATTACHMENT.)

fraud in concealing, in sales, i. 8.

of carrier, ii. 599.

innkeeper, ii. 542.

livery-stable keeper, 543 n.

boarding-house keeper, 543 n.

sheriff, ii. 251.

in case of principal and agent, ii. 442 n.

not transferable, i. 57.

of attachment, (See ATTACHMENT.)

attorney, ii. 487 n.

LIFE INSURER,

has no action for killing the insured, i. 87.

LIGHT AND AIR,

sensible diminution of, i. 664.

LIGHT AND WATER,

compared, i. 624 n.

LIGHTS, (See EVIDENCE, LANDLORD.)

right to open, i. 662.

obstruction of, by landlord, ii. 607.

lawful obstruction of, i. 662.

intent in obstructing, i. 98.

ancient, i. 72, 612, 662.

obstruction of, by grantor or his vendee, i. 663.

what is an illegal obstruction of, i. 664.

must affect the value, i. 664.

abandonment of, i. 664.

prescription in case of, i. 663 n., 667.

notice of, i. 665.

joint liability for obstructing, ii. 405.

LIGHTS, — *continued*.

- estoppel in case of, i. 663, 668.
- doctrine in United States, i. 666.
- bill in equity, i. 668.
- damages, i. 669.
- parties, i. 669.
- to be placed on highways, while repairing, ii. 367.

LIME,

- waste by digging for, ii. 91.

LIME-KILN,

- nuisance from, i. 585 n.

LIMITATIONS,

- proof of words barred by the statute of, in slander, i. 329.
- when the statute begins to run in various cases, ii. 28 n., 35, 48 n.
- when in case of fraudulent transfer of note, i. 12.
- trover, ii. 28 n., 35, 48 n.
- plea of, in slander, &c., i. 394 n.
- action against an officer, ii. 209.

LIMITED

- jurisdiction — exceeding, ii. 112.
- property, i. 504.

LIQUORS,

- sale of — as an abateable nuisance, i. 607 n.
- makes purchaser a guest, ii. 535.
- rights of property in, i. 176.

LIVERY-STABLE,

- keeper has no lien on horse, ii. 543 n.
- whether a nuisance, i. 586.

LOAN, ii. 525.

- possession in case of, i. 568.
- extraordinary care in case of, ii. 528.

LOCALITY OF ACTION,

- affected by that of the damage, i. 77 n.
- in trespass, ii. 2 n., 8 n.
- patent cases, i. 711.
- slander, i. 257.
- action for flowing, i. 659.

LOCATIO, ii. 529. (See BAILMENT.)

- operis mercium*, &c., ii. 544.

LOCUS IN QUO,

- trespass, ii. 10.

LORD'S DAY,

- contracts made on the, i. 173.

LOSS,

- of marriage — slander, i. 256.
- negotiable instruments, i. 53.
- service, action for, ii. 474. (See PARENT, &c.)
- liens. (See LIEN.)

LOST GOODS, i. 526.

LOTTERY COMMISSIONERS,

action against, ii. 224.

LUGGAGE. (See BAILMENT, BAGGAGE, CARRIERS, INNKEEPERS, PASSENGERS.)

M.

MACHINE AND PROCESS,

principle of, patentable, i. 680, 684, 693.

distinction, i. 688.

MACHINERY,

as a fixture, i. 491.

dangerous, what is sufficient care in fencing in, i. 128.

MAGISTRATE, (See JUDICIAL OFFICERS.)

testimony of, in case of malicious prosecution, i. 483.

action against for irregular proceedings, i. 107.

assuming to act as, without authority, ii. 117.

MAINTENANCE, i. 58.

MALA PRAXIS, i. 239 n.

MALFEASANCE, i. 1 n.

MALICE, (See EVIDENCE, FALSE IMPRISONMENT, INTENT, JUDICIAL OFFICERS, MALICIOUS, AND VARIOUS TORTS.)

in connection with torts, i. 132.

action for refusing vote, ii. 218.

trespass for assault and battery, ii. 25.

in malicious conviction, ii. 121.

slander, &c., i. 283 n. (See LIBEL, &c.)

slander of title. (See TITLE.)

definition of, i. 325.

is for the jury, i. 332, 355, 363, 373, 446.

allegation of, in slander, &c., i. 378.

mere surplusage in declaration for negligence, i. 132.

in case of malicious prosecution, i. 431 n., 437, 441, 452, 468, 473.

arrest, i. 222.

acts of judicial officers, ii. 120 and n., 121.

sheriff, &c., i. 96; ii. 140 n.

whether it must be shown in an action for obstructing a horse railroad, ii. 353.

MALICIOUS

arrest, i. 232, 439. (See FALSE IMPRISONMENT, JURY.)

what constitutes, i. 232.

form of action for, i. 232.

probable cause, what, i. 232. (See PROBABLE.)

pleading in action for, i. 233.

evidence, i. 236.

attachment, ii. 174. (See ATTACHMENT.)

execution, i. 445.

conviction, i. 436; ii. 121.

what is malice in, ii. 121.

waste, ii. 88.

suing out a commission of bankruptcy, i. 445, 473.

MALICIOUS, — *continued*.

- obtaining a writ of extent, i. 475 n.
- injunction, i. 445 n., 472.
- prosecution, i. 412. (See ALLEGATA, ATTACHMENT, DAMAGES, DECLARATION, EVIDENCE, GENERAL SUSPICION, MALICE.)
 - in case of arbitration, i. 474 n.
 - before a court-martial, i. 434 n.
 - for crime, i. 433 n.
 - liability of attorney for, ii. 490.
 - nature and grounds of action for, i. 433 and n.
 - whether it lies for civil action, i. 443, 456.
 - when damage must be proved, i. 437.
 - whether jurisdiction is material, i. 444 n.
 - distinction between, and other actions, i. 435.
 - want of probable cause and malice, i. 437.
 - arrest, whether necessary to, i. 433 n., 436.
 - for assault, i. 433 n.
 - conspiracy, i. 435, 440.
 - continuance of, i. 446.
 - parties, i. 438, 483; ii. 238.
 - conspiracy, i. 440.
 - public officers, i. 440.
 - husband and wife, ii. 499.
 - administrator. i. 438 n.
 - proof of want of probable cause, &c., i. 441, 449.
 - law and fact, i. 442, 450 n., 460, 463.
 - advice of counsel, i. 458.
 - bona fides*, i. 452.
 - admissions and declarations, i. 457 n.
 - burden of proof, i. 438, 441, 446, 449, 473.
 - void prosecution, warrant, indictment, &c., i. 447.
 - malice, i. 483. (See MALICE.)
 - form of action, i. 470.
 - termination of former suit, &c., i. 440, 472.
 - evidence of, i. 482. (See MAGISTRATE.)
 - distinction as to, in case of malicious attachment, i. 473.
 - abuse of legal process, i. 473.
 - what proceedings are final, i. 476.
 - award, i. 474 n.
 - not pros.*, i. 473, 476.
 - discharge of bail, i. 477.
 - return of "no bill," i. 477.
 - acquittal, i. 449, 476, 478.
 - ignoramus*, i. 477 n.
 - interlocutory judgment
 - against defendant in former suit, i. 479.
 - binding over, i. 479.
 - verdict of guilty appealed from, i. 479.

MALICIOUS PROSECUTION,

evidence of character, i. 485.

mischief in killing dog — indictment for, i. 591 n.

MALITIA, i. 467 n.**MALPRACTICE,**

of physician, i. 38, 239.

(See **ALLEGATION, PHYSICIAN.**)

of dentist, i. 240.

MALUS ANIMUS,

malice, i. 442 n.

MANDAMUS,

in case of nuisance, i. 605 n.

MANDATUM, ii. 527.**MANUCAPTION,**

not necessary to conversion, ii. 245.

MANUFACTURE,

contract of — possession, i. 562, 564.

patent for mode of, and for article manufactured, i. 690.

MANUSCRIPTS,

copyright in, i. 724.

MAPS,

copyright in, i. 712, 716.

MARGINAL NOTES,

copyright in, i. 716.

MARKET OVERT, i. 63, 68 n.**MARKETS**, i. 677.**MARKS.** (See **TRADE-MARKS.**)**MARRIAGE,**

loss of — slander, i. 256.

contract in restraint of, i. 58.

— brokerage contract, i. 58.

proof of, ii. 507.

MASTER AND SERVANT, ii. 420.(See **BROKER, DEPUTY-SHERIFF, ELECTION, EVIDENCE, IN PARI DELICTO, OFFICER, RAILROADS, SERVANT.**)

what constitutes the relation of, ii. 419 n.

libel, &c., in case of, i. 321, 369.

in case of carrier, ii. 555 n.

possession in case of, i. 568.

corporal punishment in case of, i. 196.

in case of legal process, ii. 155.

relation of, as between parent and child, i. 65; ii. 512, 520.

whether *jointly* liable, ii. 405.

contractors, &c., ii. 423, 452 n.

defence of — assault, ii. 449.

of ship — a common carrier, ii. 548 n.

general liability of a master or principal, for wilful wrongs of the servant;
trespass, i. 94; ii. 406.

liability for negligence of the servant, ii. 406, 413, 419.

MASTER AND SERVANT, — *continued*.

- liability of, by reason of his presence, ii. 420.
 - for negligence of servant's servants, ii. 422.
 - cab proprietors, ii. 423 n.
 - when the injury must arise, ii. 409, 413, 441.
 - ratification, ii. 411.
 - acts done in master's presence, ii. 412.
 - money paid to servant, ii. 412 n.
- in case of misunderstanding orders, ii. 416.
- depending on the defendant's receiving the benefit of the consideration, ii. 421.
- distinction between a servant and a *contractor*, ii. 423, 452 n.
 - where the employer keeps control of the mode of work, ii. 424.
 - sub-contractors, ii. 424.
 - intermediate agents, &c., ii. 429.
 - in case of persons employed on account of peculiar skill, ii. 424.
 - liability of owners of real estate for injuries done in the doing of work thereon, ii. 426.
 - liability of public commissioners, &c., for acts of workmen employed by them, ii. 430, 436.
 - in case of nuisance, ii. 433.
 - where the act is unlawful, ii. 434.
 - review of Massachusetts and English cases, ii. 435 n.
- liability of public officers, ii. 430, 436, 449.
 - parties employing public officers, ii. 438.
 - postmaster, ii. 437.
 - in case of gratuitous service, ii. 437.
 - corporations, ii. 439.
 - for *fraud* of agent, &c., ii. 440, 442, 446.
 - servant, to third persons, ii. 442.
 - neglect and misfeasance, ii. 444.
 - agency not disclosed, ii. 446.
 - positive force of servant, ii. 449.
 - in defence of master, ii. 449.
 - to the master, ii. 450. (See BAILMENT.)
 - only for negligence or wrong, ii. 450.
 - as a defence to action for wages, ii. 455.
 - sub-agents, &c., to master, ii. 450 n.
 - master to servant, ii. 456.
 - personal injuries :
 - latent danger in the work, ii. 457.
 - eundo, morando et redeundo*, ii. 459.

MASTER AND SERVANT, — *continued.*

liability of, to servant — there must be negligence of the master,
ii. 460.

and not of the servant, ii. 460.

for other injuries — damages recovered of servant for trespass, ii. 471.

to servant, in case of dismissal, ii. 473.

injuries by default of fellow-servants,
ii. 463.

they must be employed in the same general business, ii. 464.

exceptions to the rule, ii. 467.

negligence of employer, ii. 467.

distinct employments, ii. 470.

chastisement of servant, ii. 472.

actions by master and servant against third persons, ii. 473.

for loss of service, ii. 474.

against innkeeper for loss of goods entrusted to him by
servant, ii. 534 n.

MEASURE OF DAMAGES. (See DAMAGES.)**MEDICINES,**

druggist, a guarantor of his, i. 129.

MELTING-HOUSE,

a nuisance, i. 587.

MEMBER,

of parliament or congress, slander, &c., of, i. 299, 374.

corporation, levy on, ii. 128. (See CORPORATION, STOCKHOLDERS.)

military company, liability of, ii. 230.

MERCHANT,

slander, &c., of, i. 306.

MERGER,

of trespass in felony, i. 62.

MESNE PROCESS. (See ATTACHMENT, OFFICER.)**METAPHORS,**

slander by, i. 286.

MILITARY,

companies, rights of members of, ii. 230.

officers, liability of, i. 147 ; ii. 436, 443 n.

authority, imprisonment by, i. 209 n., 214.

MILL-ACTS, i. 634, 643.**MILL-DAM, i. 539, 624 n., 634. (See CARE, DAMS, WATERCOURSE.)****MILLER,**

public — as a warehouseman, ii. 532 n.

MILLS, (See WATERCOURSE.)

rights of owners, i. 618 n., 624.

liabilities, i. 632.

abandonment of, i. 654.

MINES, i. 121 ; ii. 91, 465.

what is sufficient care in working, i. 127.

MINES, — continued.

abandonment of, i. 499 n.

waste of, ii. 91.

MINISTER,

slander of, i. 301.

action by — possession, i. 543 n.

MINISTERIAL OFFICERS,

when justices are, ii. 112.

who are, ii. 106

injuries by and against, ii. 122. (See OFFICERS OF THE LAW, SHERIFF.)

MINOR. (See INFANTS.)**MISFEASANCE, i. 1 n., 133.****MISMARKING,**

animals — charge of, i. 254.

MISNOMER,

liability of officer in case of, ii. 128.

MISREPRESENTATION, (See FALSE REPRESENTATION, FRAUD.)

of boundary, ii. 78.

implies knowledge, i. 15 and n.

MISTAKE,

of law no defence to trespass for exceeding jurisdiction, ii. 114.

a defence to action for joint tort, ii. 251.

conversion in case of, ii. 38, 417.

MISUSE, (See CONVERSION, HORSE.)

a conversion, ii. 28, 32.

MITIGATION OF DAMAGES, (See DAMAGES, JUSTIFICATION, PLEADING, TRUTH.)in case of *crim. con.*, ii. 509.

seduction, ii. 517.

trover, ii. 69.

assault, i. 63.

malicious prosecution, i. 450 n., 485.

trespass *quare clausum*, ii. 13, 14 n., 25.

waste, ii. 90.

MIXED PROPERTY, i. 489.**MOLLITER,***manus*, &c., i. 198.*insultum fecit*, i. 199 n.**MONEY,**

had and received, in case of tort, i. 40, 53. (See ASSUMPSIT.)

action for, to be encouraged, i. 47 n.

duty of attorney in collecting and appropriating, ii. 483.

trover for, ii. 59.

MORAL TURPITUDE,

in slander, &c., i. 260.

MORTGAGE,

fraudulent foreclosure of, i. 4 n.

torts in case of, ii. 613.

conversion, ii. 617.

MORTGAGE, — *continued.*

- action by mortgagee, ii. 613.
 - case, ii. 616.
 - for waste, ii. 613.
 - for fraud, ii. 616.
- mortgagor, ii. 614.
- second mortgagee, ii. 617.

MOTHER,

- action by, for seduction, ii. 516.

MOTHER-IN-LAW,

- right to harbor, ii. 510.

MOTIVE, (See INTENT.)

- in case of malicious prosecution, i. 466. (See **MALICIOUS PROSECUTION.**)

MOVING BUILDINGS,

- nuisance by, i. 589.

MULTIFARIOUS BILL, i. 72 n.**MUNICIPAL CORPORATIONS, ii. 356, 386, 404. (See Towns.)****MURDER,**

- charge of, i. 259 n., 261.

MUSICAL COMPOSITION,

- copyright in, i. 719 n., 720 n.

MUTUAL ACCOUNTS,

- malicious prosecution in case of, i. 456, 457 n.

N.**NAME, (See MISNOMER.)**

- protected under law of trade-marks, i. 726, 732, 734.
- mistake of, in process, ii. 128.

NAVY OFFICER,

- arrest by, i. 227.

NECESSITY,

- as a justification, i. 103, 153 n.

NEGATIVE WORDS,

- in slander, i. 249.

NEGLIGENCE, i. 74, 101.

- (See **DRIVING, FIRE, GROSS NEGLIGENCE, MALICE, MASTER AND SERVANT.**)

- in doing a lawful act, i. 121 n., 125.

- driving, i. 104.

- receiving lost negotiable instruments, i. 53.

- case of malicious prosecution, i. 452, 458.

- constructing hay-rick, i. 129.

- collecting judgment, burden of proof of, i. 131.

- declaration for, i. 93 n., 132. (See **MALICE.**)

- in case of mortgaged premises. (See **MORTGAGE.**)

- as constituting intent, i. 100.

- gross, and want of ordinary care, i. 129, 135.

- by omission and commission, i. 133.

NEGLIGENCE, — *continued*.

questions of law and fact as to, i. 125, 130 n., ii. 481.

(See JURY.)

presumption as to, i. 130, 136, 162.

burden of proof of, i. 136.

allegation of, i. 132.

as affected by notice, i. 138 n.

in excavation, i. 94, 672.

causing a slide, ii. 428.

of carrier. (See BAILMENT.)

passenger on a railway train. (See BAILMENT, RAILROADS.)

with regard to cattle injured by railroad, ii. 339.

of traveller on highway, ii. 371.

servant, i. 93 n. (See MASTER.)

officer. (See OFFICER.)

bailee. (See BAILMENT.)

guest, ii. 539.

broker, i. 39.

and trespass, distinction between, in case of master and servant, ii. 442.

of attorney. (See ATTORNEY.)

as a defence to his bill of fees, ii. 487.

evidence, ii. 481.

in case of loan, ii. 529.

liability of infants for, ii. 523 n.

NEGLIGENT ESCAPE, ii. 212.

NEGOTIABLE SECURITIES,

trover for, i. 50; ii. 60.

loss of, i. 53.

NEMO ALLEGANS SUAM TURPITUDINEM, &c., 134 n.

NEW ASSIGNMENT,

in case of assault, i. 201 n.

NEW TRIAL,

in libel, &c., i. 283 n. 287, 414 n., 428.

NEW WORK,

what is a, i. 680, 712.

NEWSPAPER,

libel in — publication, i. 312, 322, 421.

who liable for, i. 322.

NOISE,

nuisance by, i. 586 n., 589, 610.

NOL. PROS.

in case of malicious prosecution, i. 473, 476, 477.

NON-FEASANCE, i. 1 n., 133.

will not make one a trespasser *ab initio*, i. 114. (See TRESPASS.)

NON-JOINDER OF PARTIES. (See ABATEMENT, JOINDER, PARTIES JOINT, PLEADING.)

NON-REPAIR,

indictment for, i. 69 n.

NONSUIT,

- in action for slander, &c., i. 393.
- replevin against several defendants, ii. 246 n.
- trespass against several defendants, ii. 267.

NON-USER,

- of watercourse, i. 654.

NOTARY PUBLIC,

- banks collecting notes, whether liable for default of, ii. 284.

NOTE,

- fraud a defence to, i. 3 n. (See FRAUD, TRANSFER.)
- return of, in case of fraud, i. 19, 23.
- liability of banks in collection of, ii. 284.
- trover for, i. 50; ii. 60, 67.
- marginal, of reports, copyright in, i. 716.

NOT GUILTY, (See TROVER.)

- plea of, in slander, i. 394, 396. (See JUSTIFICATION, PLEADING, TRUTH.)
- action for negligence, i. 136.
- assault, i. 205.
- false imprisonment, i. 212.
- trespass, ii. 11, 13.
- trover, ii. 67.

NOTICE, (See OBITUARY NOTICE, JUDICIAL NOTICE.)

- to produce, in trover for securities, i. 57 n.; ii. 67 n.
- as affecting negligence, i. 138 n.
- of process, by officer, i. 218 n.; ii. 139.
- in case of impounding, i. 514.
- waiver of, i. 514.
- regard to animals, i. 592, 595.
- to remove a nuisance, i. 603.
- of lights, i. 665.
- excavation, &c., i. 673.
- supersedeas, ii. 192 n.
- conversion, as affected by, ii. 28 n.
- to bank, what, ii. 291.
- by and to carrier. (See BAILMENT, COMMON CARRIERS.)
- of defect in highway, ii. 369.
- to servant, of dismissal, ii. 472.

NOVELTY OF PATENT, i. 680, 699.

NOXIOUS TRADE, i. 582 n., 610.

NUISANCE, i. 575. (See EMINENT DOMAIN, JURY, and VARIOUS NUISANCES.)

- in case of railroad, ii. 295 n.
- what is, i. 575, 584.
- an undefined injury, i. 575.
- by a municipal corporation, ii. 388.
- public, whether actionable, i. 69, 581.
- indictment for, i. 584 n., 607, 610.
- by livery-stable, i. 586.
- gas company, i. 582 n., 585 n.

NUISANCE, — *continued.*

- against decency, i. 585.
 - by manufacture of chemicals, i. 585 n.
 - candle-making, i. 585 n.
 - city railroad, i. 71.
 - weir, i. 72.
 - gunpowder, i. 72.
 - working a railroad near a church, i. 73.
 - and trespass, distinction, i. 575, 592, 612; ii. 2.
 - nature of, and of the property injured, i. 575, 612.
 - possession of defendant, i. 539.
 - liability of landlord for, ii. 607.
 - owner of the soil, ii. 426, 432.
 - for nuisance by contractors, ii. 433.
 - action of landlord for, ii. 610.
 - liability of master for, ii. 421, 433, 435 n.
 - misuse of one's property; acts authorized by law, i. 579. (See TORTS.)
 - to health, comfort, &c., i. 584.
 - morals, public order, &c., i. 586 n.
 - by obstruction of highway, i. 69 n., 70, 588.
 - lights. (See LIGHTS.)
 - whereby a man's trade or business is injured, i. 70.
 - omission and commission, i. 606.
 - excavation, ii. 8.
 - smells, i. 584, 610.
 - blasting, i. 72.
 - noise, i. 586 n., 589, 610. (See DOG.)
 - animals, i. 590.
 - action on the case for, i. 575.
 - parties to an action, i. 598.
 - corporation, i. 73, 577.
 - joint damage, ii. 237.
 - continuance of, i. 600, 682.
 - notice to remove, i. 603.
 - remedy in equity, i. 71, 583, 586, 604.
 - laches, i. 604 n.
 - mandamus, i. 605 n.
 - abatement, i. 69 n., 153, 534, 581, 584, 605.
 - right of, is coextensive with the nuisance to be abated, i. 606.
 - breach of the peace, i. 607.
 - prescription, presumption of license, &c., i. 608.
- (See DAMAGES, EXCAVATION, LIGHTS, WATERCOURSE.)

O.

OBITUARY NOTICE,

libel by, i. 252.

OBSCENE WORDS,

in slander, &c., i. 250.

OBSTRUCTION,

of highway, i. 69; ii. 581, 582, 588. (See HIGHWAY, TOWNS.)

by snow, ii. 366.

post, ii. 368.

horse railroad, ii. 304.

private way — action by husband and wife, ii. 499. (See JURY.)

lights. (See LIGHTS.)

navigable creek, i. 583.

tide-water, i. 583 n.

gutter, i. 640 n.

access to public house, i. 71.

OCCUPANCY,

of watercourse, i. 624.

real estate, liability attending, i. 540.

when it must be alleged, i. 540.

and possession, i. 551 n.

ODD-FELLOWS,

privileged communications between, i. 346.

OFFICE, (See OFFICERS.)

slander relating to, i. 293, 298, 389.

sale of public, i. 58.

OFFICERS, (See OFFICERS OF CORPORATIONS, OFFICERS OF THE ARMY, OFFICERS OF THE LAW, NAVY OFFICER, PUBLIC, JUDICIAL, MILITARY OFFICERS. ALSO, FOR SEVERAL POINTS REFERRED TO IN THIS INDEX AS UNDER THIS HEAD, SEE OFFICERS OF THE LAW.)

acting after expiration of office, ii. 195 n.

OFFICERS OF CORPORATIONS,

liability of corporation for,

(See BANKS, CORPORATIONS.)

OFFICERS OF THE ARMY, ii. 222, 443 n.

OFFICERS OF THE LAW, (See ARREST, ATTACHMENT, BAIL, DAMAGES, DOORS, ESTOPPEL, EVIDENCE, EXECUTION, FRAUD, INDICTMENT, KEEPERS, LIMITATIONS, MALICE, MISNOMER, NOTICE, RETURN, WRIT.)

ministerial — in general, ii. 122, 149.

torts to and by, ii. 101.

communications to, whether privileged, i. 362.

possession of, i. 569; ii. 137, 162, 198.

(See POSSESSION.)

conversion by, ii. 44.

de facto and *de jure*, ii. 122 n., 150 n., 155, 213.

acts of, *colore* and *virtute officii*, ii. 122 n.

action by, for property attached, &c., ii. 137, 162, 186 n.

(See POSSESSION.)

OFFICERS OF THE LAW, — *continued.*

ministerial — title of, to property taken by them, ii. 137, 181 n., 198.
 as affected by false return of process,
 ii. 142.

case against, ii. 123 n.

liability of parties aiding, ii. 129 n., 154, 157, 253.

rights of, in making arrest, i. 214, 222 n.; ii. 201.

(See ARREST, BAIL, ESCAPE, RESCUE.)

as to place, &c., of imprisonment, i. 215, 217.

in connection with deputies, ii. 133, 150, 152, 163,
 182, 194 n., 196.

(See EXECUTION.)

as to entering building, i. 18, 173; ii. 221, 223 n.

(See DOORS.)

civil process, ii. 18.

criminal process, ii. 20.

search-warrant, ii. 21.

(See SEARCH WARRANT.)

felony and misdemeanor, ii. 20.

bail, ii. 202.

receiptors, ii. 166 and n.

(See RECEIPTORS.)

indemnity, ii. 171, 179.

(See INDEMNITY.)

action over against creditor, ii. 170.

to use personal property attached, ii. 176.

on successive attachments, ii. 180.

to amend returns, ii. 141 n.

recapture an escaped prisoner, ii. 212, 214.

duties of, as to bail, ii. 201.

in general, ii. 122, 140, 150.

making a levy, ii. 124 n.

an arrest, i. 214; ii. 201.

payment of money collected on execu-
 tion, ii. 194.

interest, ii. 195.

to serve process, ii. 126 n., 128, 131 n., 132 n.,
 165, 171 n.

make return, ii. 141 n. (See RETURN.)

liabilities of, for assistants, ii. 150.

not levying an execution, i. 32.

on sufficient property, ii. 164,
 190.

excessive attachment, ii. 174 n.

in serving process:

as affected by jurisdiction of court issuing
 it, ii. 122 n., 125, 130.

(See JURISDICTION.)

OFFICERS OF THE LAW, — *continued.*

officers of the law, ministerial,

justification as depending on the liability to seizure of person or property, ii. 135.

justification by express terms of process, i. 220; ii. 122 n., 135.

liabilities of, in serving process — good faith, i. 99; ii. 123.

discretion, ii. 124, 132 n.

in case of erroneous and irregular judgment, ii. 129.

(See IRREGULARITY, JUDGMENT.)

when the officer is a party, ii. 126 n.

service after return-day, ii. 129 n., 136 n.

on Sunday, &c., ii. 125, 129 n., 173 n.

for negligence in serving process, ii. 131 n., 132 n., 158 n., 171.

(See NEGLIGENCE.)

in connection with execution. (See EXECUTION.)

as to property exempt from execution. (See EXECUTION, EXEMPTION.)

successive acts of a levy may be joined, ii. 187.

trespass *ab initio*, i. 115; ii. 157, 187.

levy upon property of a third person, ii. 157, 188.

mode of levy and instructions, ii. 124 n., 156, 190.

in case of attachments. (See ATTACHMENT.)

liability for receiptor, ii. 168.

action over, against creditor, ii. 170.

trespass *ab initio*, ii. 175.

successive attachments, ii. 180.

notice of *supersedeas*, ii. 192 n.

and of parties, for false imprisonment, i. 219; ii. 155.

in making arrests, ii. 125, 204.

as to return of process, ii. 130, 133, 141, 147, 150 n., 166, 190.

(See RETURN.)

amending returns, ii. 141 n.

distinction between final and *mesne* process, ii. 141.

false return, ii. 142, 149, 181, 193.

for misinformation as to return, ii. 153.

return of executions, ii. 141 n., 193.

construction of return, ii. 149.

OFFICERS OF THE LAW, — *continued.*

- ministerial, liabilities of, on contract of deputy concerning property attached, ii. 183.
- for acts of deputy after expiration of his office, ii. 152, 182.
- to debtor, ii. 153.
- purpose and intent as affecting, i. 99; ii. 139 n., 140 n. (See INTENT.)
- in regard to bail, ii. 202. (See BAIL.)
 - unlawful requisition of bail, ii. 203.
 - insufficient bail, ii. 208.
 - return of bail, ii. 209.
 - case of escape, ii. 210. (See ESCAPE.)
- action against, for malicious prosecution, i. 440.
- parties, ii. 123 n., 151, 253.
- notice before service of process, i. 218 n.; ii. 139.
- evidence — return as. (See RETURN.)
- damages. (See ATTACHMENT, BAIL, DAMAGES, ESCAPE, EXECUTION.)
- deputies of, disputes between, how adjusted, ii. 150 n.
- whether joined with officer as defendants, ii. 151.
- parties aiding, liability of, ii. 129, 154, 157, 254.
- who may bring action against them, ii. 158 n., 182.
- judicial. (See JUDICIAL OFFICERS.)
- miscellaneous — clerks of courts, ii. 122 n., 217.
- voting, ii. 218. (See VOTING.)
- taxes, ii. 219.
- customs, i. 116 n.; ii. 224.
- highways, ii. 273 and n.

OFFICIAL CERTIFICATES,

- whether libellous, i. 357.

OMISSION,

- nuisance by, i. 606.
- not an assault, i. 192.

ONUS PROBANDI. (See BURDEN OF PROOF.)

OPENING,

- right of, in slander, i. 395 n.

OPPOSITE OWNERS,

- of watercourse, i. 618 n., 638.

ORAL AND WRITTEN MISREPRESENTATION,

- under statute of frauds, i. 11 n.

ORDINARY CARE, i. 123, 134; ii. 529. (See CARE, NEGLIGENCE, GROSS.)

- in case of defective highway, i. 142 n.
- to be proved by a plaintiff, i. 154.
- of traveller, ii. 371.
- physician, i. 240.

ORIGINAL WORK,

what, i. 713.

OUSTER,

by tenant in common, &c., ii. 231.

when trespass is an, ii. 4.

OUTER DOOR, (See Door.)

what is, ii. 18, 20.

OVERSEER OF HIGHWAYS,

action against, ii. 221.

OWNERS,

of real estate — their liability in case of nuisance, &c., on their land,
ii. 426, 432. (See NUISANCE.)

of goods, as receiptors, ii. 168.

OWNERSHIP,

acts of, i. 573.

OYER,

in patent cases, ii. 710.

P.

PAPER SECURITIES,

when subjects of an action of tort, i. 49; ii. 59.

PARDON,

effect of, in action for slander, &c., i. 406.

PARENT AND CHILD,

torts in case of, i. 65; ii. 511.

seduction, ii. 511.

there must be a *service*, ii. 512.

action for seduction of child under age, ii. 512, 516.

not under age, ii. 514.

what services sufficient, ii. 514.

proof and presumption, ii. 515.

parties to suit, ii. 512, 516.

mother, ii. 516.

form of action, ii. 517.

defence, ii. 517.

in pari delicto, i. 149 and n.

damages, ii. 518.

abduction of child, ii. 520.

parties, ii. 520.

other injuries to children, i. 65; ii. 521.

action against innkeeper by, for loss of goods intrusted to him by child,
ii. 534 n.

infants, ii. 523. (See INFANTS.)

assault upon child by parent, i. 196.

PARISH,

seisin of lands, i. 551.

PARLIAMENT,

libel, &c., on members of, i. 299.

PARLIAMENT, — *continued*.

libel, &c., on candidate for, i. 356.

privilege of, as a defence to action for libel, &c., i. 358.

PAROL EVIDENCE,

of fraud, i. 7; ii. 147.

in case of malicious prosecution, i. 482.

slander, i. 297.

trover, i. 554 n.

PARSON,

waste by, ii. 195, 196.

PARTIES, (See HUSBAND, JOINT PARTIES, JOINT TORTS, NON-JOINDER,
OFFICERS OF THE LAW, PLEADING.)

and officers, respective liabilities of, i. 215; ii. 154.

to a cause — arrest of, ii. 127.

aiding officer, liability of. (See OFFICERS.)

in case of libel, &c., i. 315, 390 n., 392. (See LIBEL, &c.)

proof of, i. 421.

malicious prosecution, i. 438; ii. 238.

nuisance, i. 598.

bailment, ii. 600 n.

watercourse, i. 658.

seduction. (See PARENT.)

lights, i. 669; ii. 436 n.

violation of patent, i. 702.

abduction of child. (See PARENT.)

trespass, ii. 292.

waste, ii. 93.

trover, ii. 48 n., 64, 245.

purchasers, ii. 64.

claim of, upon innkeepers, ii. 534 n.

PARTNERS, (See FRAUD.)

torts in case of, ii. 235 n., 251, 270 n., 534 n.

in case of libel, &c., i. 319.

conversion, ii. 271 n.

malicious prosecution, i. 440.

attachment, i. 439.

rights and liabilities of creditors of one of, ii. 235.

non-joinder of, ii. 261.

as attorneys, liability of. (See JOINT, ATTORNEYS.)

PARTY-WALLS, i. 674 n.

PASSENGER-CARRIERS, i. 35.

(See BAILMENT, CARRIERS, RAILROADS.)

railroads as, ii. 360.

PASTURE,

trover on a right to, i. 497 n.

PATENT ACT, 1839, c. 88, § 7, i. 701.

15 & 16 Vict. c. 83, i. 710.

PATENT LAWS,

- jurisdiction of, i. 679 n.

PATENTS, i. 678. (See ALIEN, EVIDENCE, JURY.)

- nature, definition, &c., i. 678.

- requisites to, i. 678.

- foreign, i. 679 n.

- who may obtain, ii. 679 n.

- what may be patented, i. 680, 686.

 - combination, i. 680, 686.

 - composition, i. 680, 686.

- are assignable, i. 680.

- novelty and utility — novelty, i. 680.

 - priority, i. 682, 685.

 - dedication, i. 684.

- must be limited to what is new, i. 683.

 - combination of old machinery and composition from old materials, i. 683, 692, 696, 698.

- utility, i. 686.

 - accidental discovery, i. 687.

 - simplicity, i. 686, 691.

- practical application, i. 687.

- machine and process, i. 680.

- improvement, i. 680, 690, 696, 700, 708.

- for distinct inventions, i. 689.

- mode of manufacturing and article manufactured, i. 690.

- joint inventors, i. 690.

- infringement, i. 679, 690.

 - by imitation of part of a patented article, i. 690.

 - form of action for, and pleading, i. 694.

- specification, i. 695.

 - drawings, i. 695.

 - summary, i. 696.

 - amendment of, i. 700.

 - disclaimer, i. 698, 700.

 - construction of, i. 695.

 - excessive claim, i. 697, 700.

- transfer and license, i. 700.

 - of rights under extension, i. 701.

 - must be recorded, i. 702.

 - in case of renewal, i. 704.

 - mutual rights of parties to, i. 702.

 - by administrator, i. 702.

 - construction of, i. 703.

- injunction, i. 705.

- account, i. 707.

- practice, i. 708.

- locality of action, i. 711.

- damages, i. 708.

PATENTS, — *continued*.

mode of trial, &c., i. 709.

oyer, i. 710.

jurisdiction of Circuit Court, i. 711.

PAWNBROKER, rights of, in case of fraud, i. 21.

slander of, i. 307.

general rights of, i. 63 n., 64.

PAYMENT

of judgment — arrest after, i. 220.

purchase-money, effect on title and possession, i. 557, 563.

in sales on credit, i. 561.

money by officer. (See **OFFICERS OF THE LAW, DUTIES OF**.)

joint judgment by one party, ii. 264 n.

into court — evidence under the plea of, i. 40 n.

PEACE-OFFICER,powers of, i. 220 and n. (See **CONSTABLE, OFFICERS**.)**PEACEABLE**

possession, i. 519.

entry, i. 547; ii. 14, 15.

PEER,

arrest of, liability for, ii. 127.

slander of, i. 299.

PENAL

action for libel, &c., is, i. 242 n.

PENALTIES,

recovery of, i. 108, 111.

PENDENTE LITE,

waste, ii. 100.

PENT-ROAD,

liability of towns for, ii. 358 n.

PERCUSSIT, i. 190 n.**PERIODICAL**,

copyright in, i. 717 n.

PERISHABLE PROPERTY,

attachment of, 161 n., 175 n.

PERJURY,

malicious prosecution for, i. 434 n., 449, 453, 462, 466, 483, 484.

what is, i. 269.

accusation of. (See **LIBEL, &c.**)**PERMISSIVE WASTE**, ii. 92, 95. (See **WASTE**.)**PERPETUAL CURATE**,

dilapidation by, ii. 96.

PER QUOD SERVITIUM AMISIT. (See **MASTER, PARENT**.)**PERSON**,

torts to the, i. 190.

PERSONAL

liberty — constitutional right of, i. 208.

property. (See **PROPERTY, REAL**.)

negligence, what is, ii. 414.

PETITIONS,

and comments thereon — whether privileged, i. 355.

PEWS, i. 500.

PHYSICIAN,

joint action against, and apothecary, ii. 248 n.

negligence of, i. 38, 130, 239; ii. 503.

slander of, i. 296, 304.

PICTURES,

libellous and immoral, i. 58.

PIGEON-SHOOTING,

a nuisance, i. 585 n.

PIG-STY,

nuisance from, i. 584 n.

PILOT COMMISSIONERS,

immunity as judicial officers, ii. 102 n.

PIRACY,

in copyright. (See COPYRIGHT.)

of trade-marks. (See TRADE-MARKS.)

PITS,

ancient, watercourse, i. 631.

PLACARD,

disparaging — whether a nuisance, i. 605 n.

PLACE,

of delivery by carrier, ii. 557.

to carrier, ii. 554.

in slander, i. 257.

trespass, ii. 8 n.

PLANK-ROADS,

liability of towns for, ii. 358 n.

PLEA,

as evidence, i. 398, 408.

of justification, requisites of, i. 404, 407.

repetition in slander — requisites of, i. 411.

(See REPETITION.)

not guilty, in trover, ii. 67.

trespass, ii. 11, 13. (See TRESPASS.)

in bar in trover, ii. 120.

abatement for non-joinder, necessity of. (See ABATEMENT, JOINT.)

PLEADING. (See ALLEGATA, AVERMENTS, DECLARATION, IN PARI DELICTO, JOINT TORTS, NOT GUILTY, PARTIES, PLEA, VARIANCE, AND VARIOUS TORTS.)

in tort and contract, i. 34, 506.

trover for written instruments, i. 57 n.

action for assault, i. 204.

negligence, i. 132.

wrongful excavation, i. 672 n.

concerning party-walls, i. 675.

injury to buildings, &c., i. 677.

injury by animals, i. 595.

PLEADING, — *continued.*

- in action against selectmen for illegally assessing and collecting taxes, ii. 219 n.
- under statutes, i. 110.
- against keeper by sheriff, ii. 163 n.
 - officers, sheriffs, &c., i. 116 n.
 - (See ATTACHMENT, EXECUTION, OFFICERS.)
 - corporation, by stockholders, members, &c., ii. 280.
- by husband and wife for assault, ii. 501 n.
- concerning watercourse, i. 619, n. 649.
- for false imprisonment, i. 63 n., 212, 218 n.
 - malicious conviction, ii. 121.
 - seduction, ii. 512.
 - abduction of child, ii. 520.
 - slander, i. 246, 247, 250, 255, 269, 270, 294, 306, 308, 375, 395, n., 396.
 - (See LIBEL, &c.)
- a nuisance from dog, and for killing him, i. 590 n.
- violation of patent, i. 694.
- trespass, i. 521 n., 532 n., 535, 548; ii. 2 n., 8.
 - against joint defendants, ii. 248.
 - in case of malicious prosecution, i. 470, 474 n., 477 n.
- in possessory action for an easement, i. 522 n.
- trover, ii. 32 n., 57 n., 58, 66, 521 n.
 - against joint defendants, ii. 269, 271 n.
 - description of property, ii. 66.
- action for fraud, ii. 77.
- case of non-joinder. (See ABATEMENT, JOINT TORTS.)
 - conspiracy, ii. 256.
 - defective highway, ii. 383.
 - master and servant, ii. 411, 414, 449, 456, 476.
 - attorneys, ii. 480, 482 n., 491.

PLEDGE, —

- trover against, in case of mistake, ii. 38.

POISONING, —

- fowls, i. 165, 166.
- charge of, i. 254.
- stream, i. 633.

POLICEMAN, —

- rights and duties of. (See ARREST, CONSTABLE, OFFICERS.)

POLICY, —

- trover for, ii. 60 n.

POLITICIAN, —

- slander, &c., of, i. 356.

POLLOCK, C. B. —

- opinion of, in the case of *Swinfen v. Ld. Chelmsford*, ii. 493.

POSSE, —

- call on, ii. 154.

POSSESSION, i. 517. (See DELIVERY, JOINT, JURY, OCCUPATION.)

- as affecting torts, i. 517.

POSSESSION, — *continued.*

- assault in defence of, i. 198, 201, 203.
 - to regain, i. 199.
- of incorporeal property, i. 518, 522 n.
- in case of trespass, i. 146, 521 n., 530; ii. 7.
 - nuisance, i. 599.
- conversion requires, i. 540; ii. 50.
- of public officers, i. 543.
 - glebe lands, i. 534.
 - assignees of a bankrupt, i. 543.
 - officer, action founded on, ii. 137, 162, 198, 602.
- in case of attachment, ii. 160 n.
 - execution, i. 569; ii. 198.
 - lease, i. 522 n.
 - bailment, ii. 602.
 - carrier, ii. 554.
 - trust, i. 541.
 - conditional sale, i. 560, 565.
- and property, i. 517, 520 n., 532, 557; ii. 527 n.
 - occupation, i. 551 n.
- burden of proof of, i. 571.
- what sufficient for action, i. 518, 550, 595; ii. 64.
 - (See ACTION ON THE CASE, TRESPASS, TROVER.)
 - though wrongful, i. 525, 546.
- necessary to action, i. 518, 540, 550.
- title and right of possession; when sufficient, i. 532.
- in case of joint ownership, i. 530; ii. 240 n.
 - tenant in common, &c., ii. 232.
- part-possession, i. 533, 551 n.
- of tenant, damages for injury to, ii. 603 n.
- defence on the ground of, i. 534.
- want of, a defence, i. 50; ii. 538.
- title of a third person no defence against, i. 543.
 - the defendant, a defence against, i. 546.
 - evidence of, i. 553.
- constructive and actual, i. 533, 549, 553, 571; ii. 6.
 - adverse, i. 533, 571, 573 n.
 - limited by intent, i. 552.
 - by acts of ownership, i. 549.
 - deed, i. 553.
 - sale and gift, i. 555.
 - transfer for security of debts, i. 566.
 - agent, servant, wife, i. 567.
 - consignee, i. 556, 559.
 - writ of *habere facias*, i. 573 n.
 - mortgagee, i. 568.
 - as a defence, i. 552 n.
 - of adjoining land, i. 551.
 - land doubtfully bounded, i. 553 n.

POSSESSION, — *continued*.

constructive, in executory contracts of sale and manufacture, i. 562, 564.

a question for the jury, i. 569.

distinguished from a mere right of entry, i. 552 n.

is a *primâ facie* proof of property, i. 518.

outstanding, in trover, &c., i. 529.

POSSESSORY ACTION,

pleading in, i. 534.

POST,

in highway, liability for, ii. 368.

POSTMASTER,

liability of, ii. 47, 224, 437.

slander of, i. 301.

POTENTIAL WORDS,

in slander, &c., i. 247.

POUND,

what is a, i. 513.

POUND-KEEPER, i. 513.

POWDER,

keeping of, i. 70.

POWDER-MAGAZINE,

when a nuisance, i. 587.

PRACTICE, (See OPENING.)

in trover, ii. 67 n., 71 n.

patent cases. (See PATENT.)

copyright cases. (See COPYRIGHT.)

PRECEDENT FOR ACTION,

whether necessary, i. 74.

PRESCRIPTION,

for nuisance, i. 608.

watercourse, i. 629.

flowage, i. 616.

lights, i. 662, 666.

PRESIDENT

of corporation, agency of, ii. 278.

PRESUMPTION, (See also BURDEN OF PROOF.)

in action for malicious prosecution, i. 438, 442, 449.

slander, &c., i. 258, 269, 332.

an entry is under a deed, i. 553, 554.

of malice, in slander, i. 360, 363, 369, 371.

damage, i. 77, 304, 626 ; ii. 158.

diligence, in case of attorney. (See ATTORNEY.)

negligence, in carrier, ii. 588.

negligence, i. 130, 136 ; ii. 534, 539 n.

raised by possession, i. 546.

of continued possession, i. 549 n.

fraud, i. 18 ; ii. 74, 78.

jurisdiction of a justice, ii. 110 n.

PREVENTION OF CRIME,

an excuse for a trespass, i. 153 n.

PRICE CURRENT,

copyright in, i. 715.

PRIMA FACIE, (See BURDEN, EVIDENCE, POSSESSION, PRESUMPTION.)

evidence of nuisance, i. 581.

PRIMARY CAUSE OF INJURY, i. 140, 156; ii. 374.**PRINCIPAL AND AGENT,** (See DEMAND, LIEN, MASTER AND SERVANT.)

rights, &c., of intermediate agents, ii. 443.

liability of principal to agent — defence to action for wages, ii. 455.

agent to principal, ii. 450.

money lost *in transitu*, ii. 453.

gratuitous agent, ii. 453.

both to third parties — principal for fraud of agent, ii. 440.

agent when he has concealed the agency, ii. 446.

third parties to them — to principal for collusion with agent,
ii. 442 n.

in case of libel, &c., i. 321.

malicious prosecution, i. 438, 447.

PRINCIPLE OF MACHINE, i. 680, 684, 687, 693.**PRINTS.** (See CUTS, ENGRAVINGS, WOOD-CUTS.)**PRIORITY**

of occupation, i. 525.

watercourse, i. 624.

attachments. (See ATTACHMENTS.)

invention. (See PATENTS.)

PRIVATE

wrong, a tort is, i. 1.

letters, copyright in, i. 725.

relations, wrongs to. (See RELATIVE.)

PRIVATE WAY,

rights, &c., of railroad in respect to, ii. 303.

PRIVILEGE

from arrest or seizure, violation of, i. 219; ii. 127.

(See PARLIAMENT.)

arrest for breach of, i. 209 n.

of debate, i. 334 n.

PRIVILEGED COMMUNICATION. (See JUSTICE, LEGAL ADVICE, LIBEL.)

whether a question of law or for the jury, i. 362 n., 371.

between relatives, i. 362.

character of servant, i. 369.

to relatives of plaintiff, i. 362.

wife of plaintiff, i. 363.

relating to business, i. 364.

between landlord and tenant, i. 364 n.

master and servant, i. 369, 371.

slander in a, &c., i. 367.

(See ODD FELLOWS, OFFICERS OF THE LAW.)

PRIVITY

- in tort, i. 9 n.
- of title, in waste, ii. 99.

PRIVY,

- nuisance from, i. 585 n.

PROBABLE CAUSE,

- in case of malicious prosecution, i. 437, 441, 449, 458.
- arrest. (See FALSE IMPRISONMENT, MALICIOUS ARREST.)
- is for the court, i. 442 n.

PROCESS, (See COLOR OF PROCESS, LEGAL PROCESS, NOTICE, OFFICERS OF THE LAW, RETURN, SHERIFF, WRIT.)

- what irregularities destroy its protection, ii. 127.
- abuse of. (See ABUSE, LEGAL PROCESS.)
- conversion by seizure under, ii. 44, 55.
- parties justifying under, ii. 154.
- and machine, distinction, i. 688.

PROCEEDINGS

- in court — privileged, i. 336.
- what final — malicious prosecution, i. 476.

PROCURING

- marriage of daughter — action for, ii. 521.
- abortion, charge of, i. 292.

PROFESSIONAL MEN,

- charge of ignorance against, i. 303.

PROMISSORY NOTE,

- fraud a defence against, i. 3 n.
- fraudulent transfer of, i. 12.
- trover for, ii. 60, 67.

PROOF. (See ALLEGATA, BURDEN OF PROOF, EVIDENCE, PRESUMPTION, VARIANCE.)

PROPERTY, (See INJURIES, PERSONAL, REAL.)

- definition of, i. 488.
- general principles as to, i. 488.
- real and personal, i. 487, 489, 491, 518.
- mixed, i. 489.
- limited, qualified, and special, i. 504, 528; ii. 553, 601.
- in watercourse. (See MILLS, WATERCOURSE.)
- limited in water current, i. 624.
- in action and possession, ii. 517.
- animals, i. 504.
- party-walls, i. 674 n.
- manuscripts, i. 724.
- goods purchased by fraud, i. 18, 23 n.
- transferred to an usurious lender, i. 24.
- and possession, i. 517, 521, 532 n.; ii. 534 n.
- injuries to, i. 487.
- form of action, i. 491.
- malicious prosecution is an injury to, i. 433.
- proof of, in slander, i. 425.

PROPORTIONS,

of machine — patent, i. 684.

PRO REI POSSESSORE IN DUBIO, &c., i. 521 n.

PROSECUTION, (See IRREGULARITY, MALICIOUS PROSECUTION.)

in another's name without his authority, i. 438.

obligatory nature of, in England and America, i. 67.

PROTEST,

assumpsit to recover back money paid under, i. 42.

PROVISIONS,

sale of, i. 15, 238 n.

PROVOCATION,

of assault, i. 167. (See ASSAULT.)

in case of slander, &c., i. 426.

PROXIMATE CAUSE OF INJURY, i. 140, 156, 175.

in case of highway, i. 141; ii. 374. (See TOWNS.)

negligence — rule *in pari delicto*, i. 140.

PUBLIC,

documents, publication of, is privileged, i. 358.

entertainment, criticisms on, slander, i. 359 n.

house, obstructing access to, i. 71.

justice, contracts to defeat, i. 58.

lands — possession of, i. 551.

miller — as a warehouseman, ii. 532 n.

nuisance, action for. (See NUISANCE.)

officers. (See OFFICE, OFFICERS.)

possession of, i. 543.

whether liable for default of their employees, ii. 430, 436, 450 n.

trespass *ab initio*, by, i. 115.

slander of, i. 298, 356.

malicious prosecution in case of, i. 440.

policy, contract against, i. 58.

use of invention, i. 684.

works, liability of town for, ii. 387.

commissioners for, under statute, ii. 400.

PUBLICATION,

of libel, &c., i. 311.

what is, i. 311.

proof of, i. 420.

of private letters, i. 725.

as affecting copyright, i. 717.

of public documents, privileged, i. 358.

PUBLICI JURIS,

water is, i. 624 n.

PUBLISHERS,

and authors, mutual rights of, i. 718.

of periodicals, i. 717 n.

newspapers, libel, &c., by, i. 321 and n.

PULSATION, i. 190 n.

PUNITIVE DAMAGES, (See DAMAGES.)

in libel, &c., i. 429.

trover, ii. 69.

malicious prosecution, i. 485.

PURCHASE, (See SALE.)

tortious — conversion by, ii. 30, 32.

by agent, effect on possession, i. 567.

PURCHASER,

from fraudulent vendee, i. 23 n.; ii. 32, 80.

of machine infringing a patent, i. 694.

waste by, ii. 90, 98.

Q.

QUALIFIED,

ownership of watercourse, i. 613, 618, 624.

property, i. 505.

sale — possession in case of, i. 565.

QUASI,

arbitrators, ii. 118.

corporations, ii. 356.

judicial capacity — liability of one assuming it, ii. 118.

trade-mark, i. 732.

use of the name of an hotel, i. 732.

QUI FACIT PER ALIUM FACIT PER SE, ii. 429.

QUOTATIONS,

as affecting copyright, i. 714.

R.

RAILINGS,

want of, i. 538.

RAILROADS, ii. 293.

rights, duties, and liabilities in general, ii. 293.

rights,

to lay a track upon a street, ii. 300.

alter the grade of a street, ii. 300.

refuse to carry certain goods, &c., ii. 314.

decline certain risks, ii. 314.

with respect to passengers, ii. 321.

fares, and expulsion for non-payment thereof. (See EXPULSION.)

expulsion for disorderly conduct. (See EXPULSION.)

to exclude persons from their grounds, ii. 354.

lien on goods carried, ii. 599.

duties,

to construct under-passes, ii. 303.

culverts, ii. 312.

RAILROADS, — *continued.*

- duties as common carriers, ii. 313.
 - to express notice, ii. 314.
 - time of running, ii. 329.
 - fences, &c. (See ANIMALS, FENCES.)
 - speed at turnouts, ii. 352.
 - crossings, switches, &c., ii. 352, 353.
 - cuts, ii. 354.
 - uniformity of charges, ii. 355.
- liabilities,
 - for consequential injuries to owners whose land is not taken, ii. 295, 298.
 - in case of taking a street, ii. 300.
 - want of skill, &c., in laying road, &c., ii. 295.
 - obstructing a private way, ii. 303.
 - to riparian proprietors, ii. 312.
 - for cutting off a spring below high-water mark on a river, ii. 313.
 - for injury to a well, ii. 313.
 - as common carriers, ii. 313.
 - estopped by charter to deny this liability, ii. 547, 578.
 - (See BAILMENT.)
 - how affected by express notice. (See BAILMENT, COMMON CARRIERS, NOTICE.)
 - duration of liability, ii. 317, 561.
 - delivery, ii. 317, 555 n.
 - connecting lines, ii. 317, 561.
 - passengers, ii. 321.
 - unlawful arrest by servants, ii. 326, 328.
 - injuries in case of free tickets, ii. 328 n.
 - passenger's negligence. (See IN PARI DELICTO.)
 - resulting in death, ii. 342.
 - as warehousemen, ii. 531, 564.
 - liability for injuries to animals on the track. (See ANIMALS, FENCES.)
 - by fire from locomotive, &c., i. 119, 130 n.; ii. 350.
 - whether any, for frightening horses, &c., ii. 341.
 - for servants, &c., ii. 347. (See MASTER.)
 - collisions, i. 143; ii. 352.
 - what is gross negligence of plaintiff, i. 136 n.
 - miscellaneous liabilities, ii. 350.
 - jointly with contractors for injuries by the latter, ii. 405.
 - to servants, conductors, &c., ii. 456. (See MASTER.)
 - default of fellow-servants, ii. 463.
- land damages, ii. 296.
- contracts by, to enlarge their liability, ii. 319 n.
- by-laws, construction of, ii. 328.
- tickets, construction of. (See TICKETS.)
- time of running, ii. 329.

RAILROADS, — *continued.*

whether a nuisance, i. 71. (See **NUISANCE.**)

and highways — injury, ii. 380.

horse-railroads, ii. 303. (See **HORSE-RAILROADS, MALICE, SPEED.**)

RAPE,

assault with intent to commit, i. 192 n.

RASCAL,

charge of being a, i. 251.

RATIFICATION,

in case of partners, ii. 272.

by master, of act of servant, ii. 411.

principal, implied, of a false warranty by agent, i. 7 n.

REAL. (See **PROPERTY.)**

and personal property, wrongs to, i. 487 n.

in regard to trover, ii. 57.

effect of possession of, i. 518 n., 552 n.

property, owner of, liability of, for the act of a servant, ii. 426, 432.

liability attending the occupation of, i. 538.

REASONABLE

use of watercourse, i. 628, 635, 650.

time of delivery — carrier, ii. 559.

delay after demand — conversion, ii. 54.

RECAPTION, i. 149, 166.**RECAPTURE,**

in case of escape, ii. 212.

RECEIPTORS,

and keepers of property attached. (See **ATTACHMENT, OFFICERS.**)

liabilities of officer for, ii. 168.

creditors as, ii. 167 n.

owners as, ii. 168.

trover against, ii. 45, 169, 170.

when a demand is necessary, ii. 169.

RECEIVERS,

liability of, ii. 436.

RECOGNIZANCE,

Justice not liable for taking, ii. 112.

RECOMMENDATION,

fraudulent, i. 9, 20, 84 n., 100; ii. 84 n.

RECORD,

as evidence, i. 61 n.

trover for, ii. 59.

in malicious prosecution, i. 482.

(See **MALICIOUS PROSECUTION, EVIDENCE.**)

RECORDING,

in case of patent, i. 702.

copyright, and of assignment of copyright, i. 722.

RECOUPMENT, i. 84, 188; ii. 84.**REDELIVERY,**

effect on conversion, ii. 70.

RE-ENTRY,

necessary after disseisin to sustain trespass, i. 572.

REFUSAL, (See CONVERSION, DEMAND.)

on demand, whether *per se* a conversion, ii. 48.

what is, ii. 50, 54.

REGISTER,

of protests, privileged, i. 358.

REGISTRATION,

in case of patents, i. 702.

copyright, and assignment of copyright, i. 722.

REGULATIONS,

by carrier. (See BAILMENT.)

RELATIVE RIGHTS, ii. 101.

REMAINDER-MAN,

rights of, as to fixtures, i. 491.

REMEDIES, (See VARIOUS TORTS AND ACTIONS.)

election of, i. 3, 27, 187.

for violation of statute, i. 108.

in case of bailment, ii. 600 n.

waste, ii. 93, 96.

provided by statute, whether exclusive, i. 110.

REMOTE INJURY,

action for, i. 82, 93.

RENEWAL OF PATENT, i. 704.

RENTS,

of bawdy house, i. 58.

false affirmation as to, i. 5.

REPAIRS, (See NON-REPAIR.)

duty to set guards and lights while making, on a road, ii. 367.

REPETITION,

of slander, &c., i. 329, 404 n., 410, 415, 416.

REPLEVIN, (See INTENT, NON-SUIT, OFFICERS OF THE LAW.)

requires property, i. 518 n.; ii. 524 n., 527 n.

in case of joint parties in New York, ii. 240 n., 246 n., 267.

husband and wife, ii. 499, 502.

bailee, ii. 527.

partners, ii. 272.

between tenants in common, ii. 230.

and trespass, in case of unlawful impounding or detention, i. 513, 514.

for grain severed, i. 497 n.

goods assigned by fraudulent vendee to his *bonâ fide* creditor, ii. 81.

trees cut down, i. 496, 498.

against officer for goods attached, ii. 174 and n.

value of property, ii. 138.

what is a taking, i. 81.

effect of judgment in, on the title. i. 48.

return of writ of, ii. 145 n.

in case of rescission for fraud, ii. 82.

REPLICATION,

- de injuriâ*, &c., in action for assault, i. 200.
- false imprisonment, i. 218 n.
- to plea of the truth in slander, &c., i. 409 and n.

REPORTS

- of trials, &c., whether privileged, i. 335, 339, 357, 373, 413 n.
- official, whether privileged, i. 357.
- of courts martial, i. 357.
- in case of slander, whether a defence, i. 414.
- evidence of, i. 414 n., 416 n. (See CHARACTER.)
- copyright in, i. 716.

REPRESENTATION. (See FALSE REPRESENTATION.)

REPUTATION, (See LIBEL, &c.)

- injuries to, i. 433.
- evidence of, in slander, &c., i. 414 n. (See CHARACTER.)

RESCINDING,

- for fraud, i. 22, 30 n.; ii. 79, 82. (See FRAUD, REPLEVIN.)
- by infant, ii. 64, 524.

RESCUE, ii. 216.

RES GESTÆ,

- in case of malicious prosecution, i. 484.
- action against a sheriff for acts of his deputy, ii. 154.

RESISTING OFFICERS, i. 221 n.

RESPONDEAT SUPERIOR, ii. 275, 413.

- in case of statutory liability, ii. 393.

RESTRAINT

- of marriage, i. 58.
- trade, i. 58.

RETRACTION OF SLANDER, &c., i. 244.

RETURN. (See ATTACHMENT, EXECUTION, FALSE RETURN, FRAUD, OFFICERS OF THE LAW.)

- of note in case of fraudulent sale, i. 19, 23.
- property converted, whether a defence, ii. 70.
- process, as evidence, ii. 145, 149, 154, 171, 196.
- what is a sufficient, ii. 147.
- construction of, ii. 149.
- damages for false, ii. 143, 182.
- estoppel by, ii. 147.
- of writ of replevin, ii. 145.
- bail bond, ii. 209.

RETURN-DAY,

- service of process after, ii. 130.

RETURNING OFFICER,

- action against, ii. 224.

REVENUE OFFICER,

- action against, ii. 224.

REVERSIONER,

- rights of, in case of waste. (See WASTE.)
- suit by. (See LANDLORD.)

REVIEW,

copyright in, i. 117 n.

REVOCATION OF LICENSE. (See LICENSE.)

RIDICULE,

libel, &c., by, i. 251.

RIGHT,

of possession, i. 546.

and property, i. 557.

in trover for a negotiable instrument, i. 51.

entry and constructive possession — distinction, i. 552 n.

personal liberty, i. 208.

property in liquors, i. 176.

way, i. 77, 612, 677.

to open or obstruct lights. (See LIGHTS.)

RIGHTS

vested by statute, i. 111.

RIPARIAN PROPRIETORS, (See WATERCOURSE.)

liability of railroads to, ii. 312.

RIVER, (See RAILROADS, WATERCOURSE.)

bank of, i. 616 n., 622 n.

ROAD,

law of the, i. 93 and n.; ii. 308, 377 n.

ancient, ii. 362.

ROADS. (See TOWNS.)

ROBBERY,

charge of, i. 272.

ROGUE,

charge of being a, i. 273, 275, 303.

ROOKS, i. 506.

S.

SAFE AND CONVENIENT HIGHWAY, ii. 362.

(See JURY, TOWNS.)

SALE, (See CONVERSION, FALSE REPRESENTATIONS, FRAUD, POSSESSION.)

concealment in, i. 7.

fraud in, i. 4, 22; ii. 78.

by defendant in execution, i. 6.

by sample, i. 8.

of provisions, i. 15, 239 n.

public office, i. 58.

standing trees, i. 497.

animals impounded, i. 514.

personal property, possession in case of, i. 555.

conditional, i. 565.

payment of purchase-money necessary to sustain
trover, i. 557, 560.

but not if on credit, i. 561.

attached goods, ii. 182.

SALE, — *continued*.

- of copyright on execution, ii. 723 n.
- liquors, whether a nuisance, i. 507 n.
- by bailee, tortious, i. 25 ; ii. 32.
- infant, ii. 64.
- vendee on condition unperformed — a conversion, ii. 33, 39.
- purchaser under a lien, i. 26.
- mortgagor — a conversion, i. 26 ; ii. 32.
- mortgagee — a conversion, ii. 32.
- one tenant in common, &c., ii. 228.
- wrongful, a conversion, ii. 619. (See **CONVERSION**, **TROVER**.)
- estoppel in, i. 183 ; ii. 180 n.
- qualified — possession in case of, i. 565.

SAMPLE,

- sale by, i. 8.

SATISFACTION,

- when necessary to bar a new action, i. 49.

SCHOOL-COMMITTEE,

- not liable for expelling a child from the public school, ii. 523.

SCHOOL-MASTER,

- in a town-school, not liable for refusing to teach a person's child, ii. 523.
- assault in case of, i. 196, 205 n. ; ii. 75.

SCIENTER, i. 15, 23, 36, (See **DEMURRER**, **INTENT**.)

- in regard to animals, i. 592, 595.
- action for malicious prosecution, i. 434 n., 448.
- must be alleged, in fraud, i. 101 ; ii. 75.

SEA,

- perils of the, — carrier, ii. 571.

SEAL,

- negligence in keeping corporate, i. 168.

SEARCH-WARRANT, ii. 21.

- arrest on, ii. 146.
- entering under, ii. 21 and n., 154.
- action for maliciously obtaining, ii. 22 n.
- trespass for exceeding, ii. 129 n.

SEA-WEED,

- title to, i. 498.

SECONDARY EVIDENCE, (See **EVIDENCE**.)

- of libel, i. 421.
- indictment, in case of malicious prosecution, i. 481 and n.

SECURITIES,

- liability of attorney for taking insufficient, ii. 485.
- trover for, i. 49 ; ii. 159.

SECURITY,

- transfer for, possession in case of, i. 566.

SEDUCING AWAY OF SERVANT, ii. 475.**SEDUCTION**, i. 83, 149 ; ii. 506.

- (See **DAMAGES**, **HUSBAND**, &c., **IN PARI DELICTO**, **JURY**, **MITIGATION**, **PARENT**, &c., **PARTIES**, **PLEADING**.)

SEDUCTION, — *continued*.

action for, by executor or administrator of parent, ii. 517.
 mother, ii. 516.

damages, i. 86 n.

declaration, ii. 512.

evidence, ii. 507.

SEISIN,

of parish lands, i. 551.

SELECTMEN,

action against, i. 107; ii. 219.

for refusing to receive a vote, i. 78.

SELF-DEFENCE, i. 196, 200. (See **SON ASSAULT DEMESNE**.)**SENATOR**,

slander of, i. 298 n.

SEPARATION,

whether necessary to perfect a sale, i. 561.

SERGEANT AT ARMS,

his liability for arresting under warrant of Speaker of House of Commons,
 i. 209 n.

SERVANT, (See **MASTER**.)

conversion by. (See **CONVERSION**, **TROVER**.)

character of, communication concerning, i. 369.

SERVICE,

loss of, case for. (See **HUSBAND**, **LOSS**, **PARENT**, **PER QUOD SERVITUM**,
 &c., **SEDUCTION**.)

of process. (See **OFFICERS OF THE LAW**, **PROCESS**, **RETURN-DAY**.)

SERVITUDE, (See **WATERCOURSE**, **LIGHTS**.)

drainage, i. 539 n., 623 n. (See **SEWERS**.)

passage. (See **RIGHT OF WAY**.)

SET-OFF

of judgments in case of joint parties, ii. 270.

SETTING

fire, i. 108, 118 n., 120, 130.

on a dog, i. 151, 507, 511.

SEVERAL LIABILITY,

in tort, i. 2, 34.

SEVERANCE,

in pleading in case of joint parties. (See **JOINT**, **PLEADING**.)

effect of, on real estate, i. 501.

SEWERS, i. 120.**SHARES**. (See **RAILROADS**.)

liability of attorney for, ii. 488 n.

SHAW, **CHIEF JUSTICE**,

notice of, ii. 304.

opinion of, with respect to the liability of judicial officers, ii. 102.

rights of property in spirituous liquors,
 i. 176.

SHEEP,

damage by, i. 594 n.

SHERIFF, i. 116.

(See DEPUTY-SHERIFF, LIEN, MALICE, MASTER, OFFICERS, RES GESTÆ.)
liability of attorney to. (See ATTORNEYS.)

SHIP-OWNERS, &c.

common carriers, ii. 547.

liability of, for acts of master and crew, ii. 422.

SHIPS,

collisions, and rule *in pari delicto*, i. 141.

SHOP,

entry upon, on warrant for larceny, ii. 21 n.

SIC UTERE TUO, &c., i. 120, 577, 593.

SIDEWALK,

defective, ii. 368.

trespass on, i. 114 n.

SIGNS. (See TRADE-MARKS.)

SIMPLICITY,

as affecting right to a patent, i. 691.

SLANDER. (See LIBEL, PAROL, EVIDENCE, PLEADING.)

of title in Louisiana, i. 360 n.

by attorney, i. 359 n.

SLANDERER,

charge of being a, i. 252.

SLANG PHRASES,

in libel, &c., i. 286.

SMALL-POX,

nuisance from exposing patient in public, i. 585 n.

SMELL,

nuisance, by, i. 584, 585 n., 610 and n.

SMITHY,

when a nuisance, i. 119, 585 n.

SMUGGLING,

charge of, i. 252.

rule *in pari delicto* in case of, i. 174.

SNOW,

obstruction of road by, ii. 358, 366.

SOAP FACTORY,

nuisance from, i. 586, 610.

SON-IN-LAW,

right of, to harbor his mother-in-law, ii. 510.

SON ASSAULT DEMESNE, i. 196, 199, 205, n.

SPEAKER

of the House of Commons — arrest by order of, i. 209 n.

SPECIAL

damage — in case of slander, i. 254.

allegation and proof of, i. 256, 378.

malicious prosecution, i. 449.

jurisdiction — liability for exceeding, ii. 113.

SPECIAL, — *continued*.

- property, i. 502, 505, 528.
- of bailee, ii. 601.
- carrier, ii. 553 n.

SPECIFICATION,

- for patent. (See **PATENT**.)

SPEECH,

- freedom of, i. 334 n.

SPEED

- of railway trains, ii. 353.
- horse-railroads. (See **HORSE-RAILROAD**.)

SPIRITUOUS LIQUORS, (See **SALE**.)

- right of property in, i. 176.

SPORTS,

- nuisance by buildings erected for, i. 588.

SPRING, i. 622, 648.**SPRING-GUN**,

- injury by, i. 145.

STABLE,

- whether a nuisance, i. 586.

STABLE-KEEPER

- has no lien on horse for board, ii. 543 n.

STANDING TREES,

- sale of, i. 497 and n.

STATUTE, (See **LIMITATIONS**, **STATUTES**.)

- remedy given by, whether exclusive, i. 110.
- in case of vested right, i. 111.

violation of, is a tort, i. 108.

- remedy for, i. 108.

of limitations, in slander, &c., i. 328, 394 n.

- trover, ii. 28 n., 35, 48 n.

whether act authorized or forbidden by, is a nuisance, i. 578, 607 n.

17 & 18 Vict., c. 31, § 7 — common carriers, ii. 577 n.

of 24 Geo. ii., c. 44, § 8, to whom a protection, ii. 123 n.

Marlbridge and Gloucester against waste, ii. 194 and n.

14 Geo. III., c. 78, concerning party-walls. (See **PARTY-WALLS**.)

15 & 16 Vict., c. 83, § 41, concerning action for infringement of patent,
i. 695 n., 710. •

5 & 6 Vict. c. 45, of copyright, ii. 718 n., 724 n.

New York to prevent the commission of crime, i. 218 n.

injuries to property by acts of individuals under, ii. 397.

acts of corporation under, ii. 397.

(See **CORPORATIONS**.)

STATUTES,

- concerning mills, i. 634, 643.

STATUTORY,

- liability of a municipal corporation, ii. 493.

STATUTORY, — *continued*.

and common-law remedies, i. 108; ii. 394.
remedy exclusive in case of highways, ii. 357.

STEAMBOAT, (See SHIP.)

collision, i. 143.
injuries by fire from, i. 119.

STEAM-ENGINE,

whether a nuisance, i. 590.

STEAM POWER,

not patentable, i. 687.

STEP-FATHER,

action by, for seduction of step-daughter, ii. 516.

STEREOTYPED PLATES.

execution sale of, does not pass a copyright, i. 723 n.

STEWARD,

of court-baron, liability of, as a judicial officer, ii. 109.

STOCK,

false certificates of, ii. 278. (See BANKS.)
certificates of, not negotiable, ii. 279.

STOCKHOLDERS,

rights of, ii. 280, 290, 418 n.
to subscribe for new stock, ii. 280.
to enjoin acts of officers, ii. 402 n.

STOCK-JOBING, i. 58.

STOLEN GOODS. (See AUCTIONEER, BAILMENT, INN-KEEPER, TORT AND CRIME.)

STONE,

the subject of waste. (See WASTE.)

STOPPAGE *IN TRANSITU*, i. 557; ii. 38.

STREAM. (See POISONING, WATERCOURSE, RIVER.)

STREETS, (See RAILROADS, TOWNS, HIGHWAY, ROAD.)

rights and liabilities of railroads in respect to, ii. 300. (See RAILROADS.)
horse-railways, ii. 303.

SUB-AGENTS. (See MASTER.)

SUB-CONTRACTORS. (See MASTER.)

SUBPÆNA,

case against witness for disobeying, i. 77 n.

SUBROGATION,

in case of life insurance, i. 87 n.
(See EXECUTOR.)

SUB-SOIL,

grant of, i. 500.

SUBTERRANEAN STREAM, i. 621.

SUCCESSIVE

acts of levy may be joined, ii. 187.
attachments, ii. 180.
executions, ii. 180 n.

SUCCESSOR OF SHERIFF, ii. 211.

SUMMARY,

in specification for patent, i. 696.

proceedings before a justice, whether judicial. (See JUDICIAL.)

SUNDAY. (See LORD'S DAY.)

service of process on, ii. 125, 129 n.

contracts made on — *in pari elicto*, i. 173; ii. 33.

SUPERSEDEAS, ii. 129 n., 192 n.

SUPERVISOR OF TAXES,

action against, ii. 221 n.

SUPPORT. (See BUILDINGS, EXCAVATION, SURFACE.)

SURFACE,

right to support of, over mines, i. 127, 500.

— drainage, not a watercourse, i. 615 n.

SURGEON,

malpractice of, i. 239.

libel upon, i. 355.

SURPLUSAGE, i. 35.

in case of slander, &c., i. 264, 296, 388 and n., 419.

negligence, i. 132.

fraud, ii. 76.

SURPLUS MONEY,

in case of executions, ii. 195 n.

SURVEYOR,

protected by order of road-commissioners, ii. 222.

not liable for taking stone to repair the highway, i. 110.

nor for damage by turning a watercourse, i. 111.

SURVIVORSHIP,

in case of libel, &c., i. 324.

trespass against officer for default of his deputy, ii. 183.

injury by negligence, i. 87 n.

malicious prosecution, i. 438 n.

fraud, ii. 84 n.

SUSPICION,

evidence of, in slander, &c., i. 423 n.

arrest on, i. 224.

entry and search of dwelling-house on, ii. 23.

SWEARING,

charge of false, i. 391, 399. (See LIBEL, PERJURY.)

SWINDLER,

charge of being a, i. 276, 293.

SWINFEN v. LORD CHELMSFORD,

opinion of Pollock, C. B., in, ii. 493 n.

SWITCH,

on a railway, ii. 352.

SWITCH-TENDER, (See MASTER, RAILROAD.)

SYMBOLICAL DELIVERY,

conversion, ii. 30.

T.

TAKING, (See **CONVERSION.**)

wrongful, whether necessary to trespass, ii. 4.

trover, ii. 245. (See **CONVERSION.**)**TANNERY,**

nuisance from, i. 585 n.

TAVERN,trespass *ab initio* by remaining in, after orders to quit, i. 113 n.**TAXATION,**

action relating to, ii. 219.

TEACHER,

corporal punishment by, i. 196, 202.

TENANT,

rights of, as to fixtures, i. 491.

TENANT AT WILL,

action of trespass by, i. 525.

waste by, ii. 97.

action by, against his landlord, ii. 606.

TENANT BY THE CURTESY,

waste by, ii. 95.

TENANT FOR LIFE, (See **WASTE.**)

rights of, as to fixtures, i. 491.

waste by. (See **WASTE.**)**TENANT FOR YEARS,** (See **LANDLORD.**)waste by, ii. 97. (See **WASTE.**)

expulsion of, i. 154; ii. 605.

TENANTS IN COMMON, (See **JOINT TENANTS.**)actions between, by and against. (See **JOINT TORTS, PARTITION.**)

replevin between, ii. 230.

ouster and ejectment between, ii. 231.

of crop raised on shares, ii. 605.

by confusion of goods, i. 502.

of tree, i. 496.

waste by, ii. 96.

creditor of one of, ii. 235.

ejectment by one, ii. 283.

TENANT IN DOWER,

waste by, ii. 94.

in case of an assignment of the estate, ii. 94.

TENDER,

in case of trover, ii. 47, 57.

of note, in case of fraudulent sale, i. 19, 23.

waiver of, ii. 82.

freight to carrier, ii. 551 and n.

TENEMENT, i. 489.**TERMINATION OF PROCEEDINGS.**

in suit for malicious prosecution, i. 437, 472.

(See **MALICIOUS PROSECUTION.**)

THIEF,

charge of being a, i. 271.

THINGS IN POSSESSION AND IN ACTION, i. 2. (See CHOSSES.)

THIRD PERSONS,

title of, in defence, i. 543.

THOMAS, J.,

his review of the law of master and servant, ii. 435 n.

THREATS, i. 191, 197 n.; ii. 36, 43.

conversion in case of, ii. 43.

malicious prosecution for, i. 464.

action on the case for injury from, i. 191 n.

THROUGH TICKETS,

on railway, ii. 590 n.

TICKETS,

of railroads, construction of, ii. 326.

free, ii. 330.

through, ii. 590 n.

TIDE,

obstruction of, i. 614 n.

TIMBER,

cutting of, i. 497 n., 498; ii. 6, 57, 88, 417 n.

by tenant in common, ii. 226 n., 228.

servant, ii. 417 n.

reservation of, i. 497 n.

trover for, ii. 57.

severed by a storm, ii. 88 n.

TIME,

of conversion, in trover, ii. 28 n., 35, 48 n., 54.

in trespass, ii. 8.

at which, value is to be estimated in trover, ii. 69, 71.

of delivery by carrier. (See BAILMENT, DELIVERY.)

running trains — liability of railroads, ii. 329.

TITLE, (See EXECUTION, IN PARI DELICTO, OFFICERS OF THE LAW, POSSESSION, PRIVACY.)

of third person, whether a defence, i. 543.

estoppel as to, i. 542 n.; ii. 172.

examination of — liability of attorney for, ii. 485.

passes by judgment in tort, i. 47.

subsequent purchaser, i. 48.

when necessary to defence of *in pari delicto*, i. 171.

slander of, i. 359 n.

conclusive in case of concurrent possession, i. 530.

a defence against possession, i. 525, 546.

in trespass, ii. 11, 13 n., 14.

proof of, i. 519, 535.

to support assumpsit on waiving the tort, i. 44.

case, i. 524.

trover for securities, i. 50.

of real estate cannot be tried on assumpsit, i. 46 n.

TITLE, — *continued*.

- assertion of, by assault, i. 149, 548.
- to crops, i. 497 n., 523 n.

TITLE-DEEDS,

- trover for, i. 56.

TOBACCO-MILL,

- nuisance from, i. 585 n.

TOLL BRIDGE,

- owner of, not a common carrier, ii. 546 n.

TORT, (See **INTENT**, **LANDLORD**, **MALICE**, **OFFICERS**; ALSO **VARIOUS TORTS**.)

- definition, i. 1.
- and nuisance, i. 69, 575 n.
- derivation of the name, i. 1 n.
- distinction of, from contract and crime, i. 1.
- and contract, i. 3, 13; ii. 265, 270 n., 533, 603.
- pleadings in case of, i. 34.
 - husband and wife, ii. 498, 505.
 - carriers, i. 37.
 - lease, ii. 603.
 - bailment, i. 38.
 - mortgage, ii. 613.
- burden of proof in case of, in general, i. 75.
- continuance of, i. 446, 455, 600, 658; ii. 6.
- liability of corporation for, ii. 273.
- as affected by possession, i. 518, 538.
- and assumpsit, i. 27 n.
- contribution in case of, i. 2, 189.
- to the person, i. 190. (See **ASSAULT**, **FALSE IMPRISONMENT**.)
- to relative rights, ii. 101. (See **OFFICERS OF THE LAW**.)
- in case of husband and wife, ii. 498. (See **HUSBAND**.)
- no privity in, i. 9 n.
- waiver of, i. 27 n., 40, 114 n., 186. (See **IN PARI DELICTO**.)
- infancy, in case of, i. 40 n.; ii. 523 and n. (See **INFANCY**.)
- in case of parent and child, i. 65; ii. 511. (See **PARENT**.)
- contract to commit, i. 58.
- and crime, i. 60, 406.
 - may coincide, i. 60 and n.
- whether merged in crime, i. 61 and n., 65.
- general nature and elements of, i. 74.
- how far governed by precedent, i. 74.
- foundation of, i. 75.
 - loss and injury, i. 76.
 - nature of the act constituting, i. 80.
 - immediate and remote effect, i. 82, 88, 92.
 - death of a human being, i. 87 and n.
- intent in, i. 95 and n.
 - must be accompanied by unlawful act, i. 98.

TORT, — *continued.*

consisting in negligence or want of care, i. 93, 95, 118 n., 121 n., 123.

(See NEGLIGENCE.)

as determining the form of action,
i. 101.

accident, i. 101.

misrepresentation, i. 99, 100.

unlawfulness, i. 103.

as affecting the form of action, i. 106.

violation of statute, i. 108.

abuse of statutory right, i. 109.

remedy, i. 109.

whether exclusive, i. 110.

act in itself lawful, i. 113, 117.

nonfeasance, i. 133.

trespass *ab initio*, i. 113 n. (See TRESPASS.)

committed against a party himself in fault, i. 134.

(See IN PARI.)

burden of proof as to this point, i. 136, 143.

a question for the jury, i. 137, 162.

proximate and primary cause, i. 140.

collision, i. 93, 141.

defective highway, i. 142.

fraud on the part of the plaintiff, i. 145.

violation of contract, i. 146, 169.

neglect of plaintiff's legal rights and duties, i. 146 ;
ii. 116.

seduction, i. 149.

(See HUSBAND, PARENT.)

trespass of plaintiff by himself or his animals — re-
caption, &c., i. 149.

animals, i. 151.

abatement of nuisance, i. 153, 166.

prevention of crime, i. 153 n.

plaintiff's agreement to the act, i. 154.

exceptions to the general rule.

(See IN PARI DELICTO.)

in case of illegality, i. 172.

TORTIOUS. (See WRONGFUL.)

TOW-BOAT,

owners of, whether common carriers, ii. 549.

TOWN SCHOOL. (See SCHOOL-MASTER.)

TOWNS. (See HIGHWAY, STATUTORY, REMEDY.)

liability of, for highways, i. 70, 141 ; ii. 356.

declaration, i. 108 n. ; ii. 361.

depends on statutes, ii. 357.

construction of statutes, ii. 362 and
n., 369 n.

culverts, &c., ii. 358.

TOWNS, — *continued*.

- liability of, in case of plank-roads and toll-ways, ii. 358 n.
 - pent roads, ii. 358 n.
 - for highways — what laying out creates it, ii. 359.
 - user, ii. 360.
 - commencement of liability, ii. 360.
 - ancient roads, ii. 361.
 - “safe and convenient,” what is, ii. 362.
 - “defect or want of repair,” ii. 362 n.
 - questions for the jury, ii. 363.
 - obstruction by snow, ii. 358, 366.
 - injury by frost, ii. 366.
 - guards and lights, while repairing, ii. 367.
 - fences, when necessary, ii. 367.
 - posts, when an obstruction, ii. 368.
 - njury by thaw, ii. 371.
 - sidewalks, ii. 368.
 - notice of defect, ii. 369.
 - implied, ii. 370.
 - rule *in pari delicto*, i. 141; ii. 371.
 - proof of negligence, i. 371.
 - onus probandi*, ii. 372.
 - town may recover against party obstructing, ii. 380 n.
 - primary and secondary cause of injury, i. 140; ii. 374.
 - for what sort of injuries towns are liable, ii. 379.
 - proof of injury, ii. 380 n.
 - as affected by liability of other parties, ii. 380.
 - officers, ii. 391, 439.
 - for obstruction by a railroad, ii. 381.
- action against, for injury, by husband and wife, ii. 499.
- is not an action respecting an easement on real estate, ii. 383.
- general and miscellaneous liabilities, ii. 386.
- may be sued in tort, ii. 387.
- whether liable for their public works, ii. 387.
- acts of their agents, servants, &c., ii. 388, 439.
 - neglect to enforce ordinances, ii. 389.
 - injuries from grading streets, or mobs, ii. 390, 391.
 - not keeping accurate records of deeds, i. 147.

TRACK-MAN. (See MASTER AND SERVANT, RAILROADS.)

TRADE,

- contract in restraint of, i. 58.
- colloquium as to, in slander. (See COLLOQUIUM.)

TRADE-MARKS, i. 79 n. (See QUASI TRADE-MARK.)

- piracy of, i. 727.

TRADE-MARKS, — *continued*.

- what may be used as, i. 727.
- colorable imitation of, i. 730.
- discontinuance and abandonment of, i. 728, 730.
- action concerning, i. 731.
 - parties, i. 731.
 - alien, i. 731.
 - commission-merchant, ii. 732.
 - trading corporations, i. 734.
- defence, i. 730.
- injunction, account, &c., i. 728.

TRADESMAN,

- libel, &c., of. (See LIBEL, &c.)

TRANSFER

- of patent, &c., i. 700.
- public office, i. 58.
- possession by deed, i. 553.
 - gift and sale, i. 555 n.
- for security of debts — possession in such case, i. 566.

TRANSITUS, i. 557; ii. 38.

TRANSLATION,

- whether a breach of copyright, i. 715.
- copyright in, i. 715 n.

TRAVELLER. (See NEGLIGENCE, TOWNS.)

- ordinary care of, ii. 371.

TREASON,

- charge of, i. 259 n.

TREASURER

- of corporation, liability of, ii. 403.

TREES. (See WASTE, TIMBER.)

- sale of standing, i. 497.
- property in, i. 503.
- replevin for, cut down, i. 496, 498.
- overhanging — a nuisance, i. 606.
- conversion of, ii. 57.
- trespass to, i. 110, 496, 550.

TRESPASS, ii. 71. (See ARREST, DOORS, EVIDENCE, INJUNCTION, LIBERUM TENEMENTUM, MITIGATION, NONSUIT, POSSESSION, PROCESS, SEARCH-WARRANT, TIME, TITLE.)

- definition of, i. 80; ii. 1, 187.
- what amounts to a taking, ii. 5.
- vi et armis*, and on the case, i. 106. (See TRESPASS ON THE CASE.)
- continuance of, ii. 6.
- acquiescence in, i. 186.
- waiver of, i. 81, 114 n.
- ratification of, ii. 411 and n.
- when an ouster, ii. 4.
- joint, ii. 242 and seq.

TRESPASS, — *continued.*

and nuisance in case of dogs, &c., i. 592.

ab initio, i. 113, 527; ii. 4, 129 n., 158, 187.

(See OFFICERS OF THE LAW.)

in impounding cattle, i. 116, 513, 514.

working an estray, i. 116.

license, i. 113.

in a balloon, i. 105.

to the person, i. 190.

and case, i. 92, 96, 107, 470, 494 n., 499, 507, 592, 612; ii. 120 n., 139, 155 n., 176, 408, 412, 506, 517.

(See ACTION ON THE CASE, VIS PROXIMA.)

distinction in case of malicious prosecution, i. 471.

and assumpsit, i. 27, 40, 44 n., 46 n.

replevin for illegal impounding, i. 513, 514.

trover, i. 46 n.

(See TROVER.)

founded on possession, i. 518, 552.

(See POSSESSION.)

what possession or title will sustain or defeat, i. 525, 526; 273, 290 n., 583.

whether upon a dwelling-house, ii. 18.

sidewalk, i. 114 n.

for injury to and cutting down trees, i. 495, 550.

waste, ii. 97.

against tenant at will, ii. 97.

expulsion from the common close, i. 532.

seduction. (See SEDUCTION.)

fixtures, i. 491 n.

(See FIXTURES.)

violating possession of a pew, i. 501.

pulling down bath-houses, i. 494 n.

bridge, i. 501, 523 n.

occupation of land, i. 32 n.

injury to and by animals, i. 507.

an easement, i. 523 n.

dam, i. 613.

taking away a deed, ii. 5.

wrongful levy. (See OFFICERS, EXECUTION.)

act of sheriff's deputy, ii. 150.

under statute, 1 Geo. ii. ch. 4, i. 101.

and waste, ii. 87.

nuisance — distinction, i. 575, 592, 612; ii. 2.

vi et armis, ii. 516.

between part-owners of a party-wall, i. 674 n.

tenants in common, &c., ii. 277, 282, 284 n., 286.

against corporation, ii. 322.

judicial officers, ii. 169, 171, 304.

TRESPASS, — *continued.*

against attorney, ii. 493.

mortgagee of bailee, i. 496 n.; ii. 582 n.

selectmen for enforcing an illegal tax, ii. 271.

collector, ii. 272.

of servant, ii. 422, 454.

infants, ii. 521.

by tenant and landlord. (See LEASE, LANDLORD, TENANT.)

mortgagor and mortgagee. (See MORTGAGE.)

occupier of vacant State lands, i. 125 n.

husband and wife. (See HUSBAND.)

tenant at will, i. 525.

servant, agent, &c., i. 567; ii. 422 n., 457 and n.

cattle, i. 508, 593.

minister of a parish or society, i. 543 n., 556 n.

gas company, for injury to lamp posts, i. 543 n.

heir or devisee, before entry, i. 552 n.

officer, after a seizure, ii. 137, 162, 198.

ministerial officers, ii. 139.

joint tenants and tenants in common, ii. 287.

distinction between, and other wrongs, ii. 2.

remedies, ii. 208.

questions of law and fact as to, ii. 2 n.

survivorship in, ii. 239.

quare clausum and *de bonis asportatis*, ii. 2, 319 n.

on constructive entry, ii. 5.

onus probandi, i. 519 n.; ii. 11.

de bonis asportatis, effect of judgment in, i. 44.

for assault, i. 63; ii. 3. (See ASSAULT.)

malice, i. 94.

whether a forcible taking or entry is necessary, i. 80; ii. 5.

not barred by judgment in trover, ii. 312.

merged in felony, i. 62.

locality of the action, ii. 2 n., 8 n.

parties, ii. 71, 292.

pleadings, ii. 2 n., 8.

(See NOT GUILTY, PLEADING.)

demand in New York, i. 18 n.

description of *locus in quo*, ii. 9.

defence of property in defendant, ii. 10, 14, 83.

defendant's master, i. 537.

entry to abate a nuisance, i. 153.

license, ii. 13, 15, 18 n.

possession, i. 534; ii. 7.

other defences, ii. 13.

(See MISTAKE.)

practice in, ii. 11 n., 12 n.

costs, ii. 3 n.

TRESPASS, — *continued.*

to try title, i. 535.

malicious prosecution for, i. 434 n.

TRIALS,

reports of, privileged, i. 335. (See LIBEL, &c., REPORTS.)

TROVER, ii. 26. (See CONVERSION, DEMAND, EVIDENCE, INTENT, LIMITATIONS, MITIGATION, TENDER, TIME, TITLE.)

requisites for, ii. 26.

and case, i. 522 n., 541; ii. 40, 452, 574.

assumpsit, i. 32, 40 n., 46 n., 541; ii. 40.

trespass, i. 46 n., 518 n., 522 n.; ii. 4 and n.

defendant must have control of the property, ii. 50.

in case of bailment, i. 25.

(See BAILMENT.)

trust property, i. 541.

possession as the foundation of, i. 529, 540.

property as the foundation of, i. 521 n.

what possession, title, &c., sufficient, i. 522 n., 526.

award, i. 3 n.

right of pasture, i. 497 n.

for what property, ii. 57.

property stolen, i. 64, 514.

choses in action, &c., i. 50, 53; ii. 59.

notice to produce, i. 57 n.; ii. 67 n.

fixtures, i. 491 n.; ii. 58 n.

house, i. 493; ii. 58 n.

materials, i. 493.

timber, ii. 57.

trees cut down, i. 497 n.; ii. 57.

crops, ii. 58, 227.

dog i. 506.

goods wrongfully attached, ii. 44, 156, 186.

notes obtained by a forgery, i. 50 n.

paid, i. 52.

checks, i. 51; ii. 291.

bills of exchange, i. 52.

deed, i. 56.

waste, ii. 97.

parties in, i. 52; ii. 64, 245.

landlord, ii. 612.

administrator, i. 544; ii. 68.

bailor, i. 522 n.

bailee, i. 522; ii. 527 n.

married woman, ii. 503.

officer, for goods taken from him after a levy, ii. 137, 162, 198.

pledgee, ii. 36 n.

receiptor, ii. 163.

consignee, i. 522 n.

TROVER, — continued.

by executor of sheriff for property attached, ii. 163.

one of several joint tenants, &c., ii. 239.

between joint tenants, &c., ii. 226, 236.

in case of partnership, ii. 271.

husband and wife, ii. 501.

against carrier, ii. 43, 574.

pledgee in case of mistake, ii. 38.

infants, ii. 523 and n.

fraudulent purchaser, i. 18, 21.

officer, ii. 44, 151, 172, 185.

usurious lender, i. 24.

postmaster for letter, ii. 47.

tax-collector, ii. 220.

several defendants, ii. 245, 250.

receptor, ii. 145, 170.

master, ii. 406, 417, 448 n.

servant, ii. 443, 447.

pleading in, i. 57 n., 521 n. ; ii. 32 n., 66, 521 n.

(See NOT GUILTY, PLEA IN BAR.)

declaration, ii. 67.

defences — when a judgment is a defence, ii. 45.

title in third person, ii. 52.

must be *bonâ fide*, ii. 54.

inability to deliver, ii. 50.

practice in, ii. 67, 71 n.

verdict, ii. 69 n.

damages, ii. 69. (See DAMAGES.)

for detention, ii. 69.

judgment in — effect of, i. 48.

TRUST,

conversion by breach of, ii. 39, 442 n.

as connected with possession, i. 541.

TRUSTEES,

of town — liability for enforcing an illegal tax, ii. 115.

default of workmen employed in public works,
ii. 430.

under a will — waste by, ii. 96.

turnpike act — liability of, ii. 398.

officers of corporation, liable as, ii. 279.

TRUTH,

justification of, in slander, i. 270. (See LIBEL.)

plea of the — a repetition, i. 375.

replication to, i. 409 and n.

TUNNELLING,

in case of railroad — whether actionable, ii. 300.

whether a nuisance, i. 579.

TURF,

digging, i. 497 n.

TURNOUTS,

on railways, ii. 352.

TURNPIKE,

a highway, i. 508 n.

liability of the corporation, i. 273; ii. 369 n.

trustees under turnpike act, ii. 398.

U.

UNAVOIDABLE ACCIDENT, i. 94, 96, 101, 130, 141.

UNCERTAINTY,

cured by verdict, i. 393.

UNCONSTITUTIONAL STATUTE,

acts of a justice under, ii. 113.

UNDER-PASSES,

where railroads must make, ii. 303.

UNDER-SERVANTS,

direct liability of master for, ii. 422.

UNIFORMITY OF CHARGES,

by railroads, ii. 379 n.

UNLAWFULNESS,

a test of liability, i. 103.

UNRECORDED DEED,

as evidence of possession, i. 553.

UNSEAWORTHINESS,

liability of carrier for, ii. 571.

UNWHOLESOME FOOD

a nuisance, i. 585 n.

USAGE,

as to the collecting of notes by banks, ii. 284.

in sale, i. 17 n.

of carrier, ii. 586.

proof of, of warehousemen, ii. 532 n.

USE, (See WATERCOURSE.)

of patented article, and of an invention. (See PATENT.)

when a conversion, ii. 29.

of cattle, a protection against a distress of them, i. 512.

personal property attached, ii. 176.

highway — liability arising from, ii. 361.

water, is an easement, i. 647.

USER, (See NON-USER.)

boundary by, i. 550.

USURIOUS LENDER,

trover against, i. 24.

USURY, i. 12, 24, 58, 177; ii. 36 n.

remedy for, i. 33.

UT CURRERE SOLEBAT, i. 618, 624 and n.

UTILITY OF PATENT, i. 680, 686.

V.

VACANT LANDS,

possession of, i. 550.

VALUE,

allegation of, in trover, ii. 67 n.

slander of, i. 359 n.

peculiar to the plaintiff — damages for, in trover, ii. 69.

VARIANCE,

parol evidence to correct, i. 418.

in trover, ii. 67.

for securities, i. 57 n.; ii. 67.

action for false representations, ii. 86.

against agent, ii. 451.

carrier, ii. 576 n.

of deceit, ii. 77.

slander, i. 247, 250 n., 256, 268, 296, 399 n., 402, 413 n.

(See LIBEL.)

for malicious prosecution, i. 456, 478.

injury to cattle, i. 507 n.

party-wall, i. 675.

watercourse, i. 619 n.

by defect in highway, ii. 377 n., 384.

in declaration, &c., and plea for a trespass, i. 537, 540; ii. 2, 8.

joint trespass, ii. 252.

VEGETABLE PRODUCTIONS,

title to, i. 497 n.

VENDEE,

waste by. (See WASTE.)

VENUE,

in case of assault, &c., i. 206.

VERACITY,

proof of character for. (See CHARACTER.)

VERBERATION, i. 190 n.

VERDICT, (See VARIOUS ACTIONS AND TORTS.)

as evidence, i. 60 n., 519 n.

in action for assault, &c., i. 205.

trover, ii. 69 n.

slander, i. 380, 431.

case of joint parties, ii. 264, 269.

what is cured by, in various cases, i. 132, 393; ii. 500 n.

slander, i. 264, 299, 431.

uncertainty of, i. 393.

VESTED RIGHT,

statute remedy in case of, i. 111.

VEXATIOUS SUIT, i. 443.

by a corporation, ii. 274.

VICAR-GENERAL OF BISHOP,

judicial liability of, ii. 109.

VIGILANTIBUS NON DORMIENTIBUS, &c., 134 n.

VILLAIN,

charge of being a, i. 251.

VINDICTIVE DAMAGES, (See AGGRAVATION, DAMAGES, EXEMPLARY AND PUNITIVE DAMAGES, MITIGATION.)

in trover, ii. 69.

libel, &c., i. 429.

malicious prosecution, i. 474 n.

VIOLENCE,

excess of. (See ASSAULT.)

VIS PROXIMA ET VIS IMPRESSA, i. 93 and n.

VOID,

judgment, ii. 45 and n.

malicious prosecution, warrant, indictment, &c., i. 447, 483.

VOIDABLE EXECUTION. (See EXECUTION.)

VOLENTI NON FIT INJURIA, i. 134 n.

VOLUNTARY,

associations — conversion, ii. 229.

waste, ii. 92.

escape, ii. 210, 215.

VOTING,

injury connected with, i. 78 and n., 148; ii. 218.

W.

WAIVER, (See PLEADING.)

of tort, i. 27 n., 140, 186. (See IN PARI DELICTO.)

by implication, i. 44, 81.

trespass, i. 81, 114 n.

conversion by subsequent demand, ii. 48 n.

otherwise, ii. 71.

fraud, ii. 81.

action for false return, ii. 143.

tender. (See TENDER.)

objections for non-joinder of parties, ii. 241.

to parties in slander, i. 318.

forfeiture for waste, ii. 90.

WALLS. (See EXCAVATION, PARTY-WALL.)

WAREHOUSEMEN, ii. 530, 559 n., 561.

when railroads are, ii. 317, 561.

confusion of goods by, ii. 532 n.

proof of usage among, ii. 531 n.

WARRANT, (See SEARCH WARRANT, SERGEANT-AT-ARMS.)

necessary to an action for malicious prosecution, i. 433 n.

need not be on a sufficient charge, i. 448.

action for maliciously granting, ii. 120 n.

void, liability for serving, ii. 115, 130.

WARRANT, — *continued*.

for refusing to give security to keep the peace, i. 218 n.

WARRANTY

does not require *scienter*, i. 15, 36.

fraudulent, i. 5, 6; ii. 78.

case for, i. 5.

no bar to action of deceit, i. 5.

of gun, liability on, i. 12.

implied. (See SALE, VENDOR, &c.)

of copyright assigned, i. 723.

WASTE, ii. 87. (See ESTREPEMENT, EVIDENCE, GOOD HUSBANDRY, GRAVEL, MITIGATION, PARTIES, PRIVITY, STATUTE OF MARLBIDGE, STONE, TURF.)

in England and America, ii. 89.

province of the jury in case of, ii. 92.

applies only to real property, ii. 87.

definition, ii. 87.

act of God, &c., ii. 93.

permissive and voluntary, ii. 92, 94 n.

may consist in neglect, ii. 87.

by a third party, ii. 156.

malicious, ii. 88.

equitable, ii. 88.

and trespass, compared, ii. 87.

by building a house, ii. 92.

 felling timber, ii. 88.

 disturbing the soil — mines, &c., ii. 87, 91. (See MINES.)

 change in the use of land, ii. 87, 91.

of buildings, ii. 87, 92.

 fixtures, ii. 92 n.

on a farm, ii. 91.

by purchaser, ii. 90, 98.

 widow or tenant for life, ii. 90, 93.

 years, ii. 95.

 in dower and curtesy, ii. 94.

 common, ii. 96.

 husband, ii. 95.

 ecclesiastical persons, ii. 95.

 execution defendant in possession, ii. 98.

 guardian, ii. 96.

pendente lite, ii. 100.

between tenants in common, &c., ii. 234 n.

in case of mortgage, ii. 613.

 lease, ii. 88, 95.

 clause “without impeachment of waste,” ii. 88.

 deed obtained by fraud, ii. 98.

 adverse possession, ii. 99.

and betterments, in case of disseisin, i. 574.

WASTE, — *continued*.

- waiver of forfeiture for, ii. 90.
- statutory provisions, ii. 87 n.
- remedies for, i. 26; ii. 93.
 - action of waste, ii. 93.
 - and of contract, ii. 97.
 - trover and of trespass, ii. 97.
 - on the case, ii. 96.
 - parties, ii. 93.
 - contingent remainder-man, ii. 93.
 - husband in right of his wife, ii. 93.
- injunction, ii. 90, 100.
- account, ii. 90, 99.

WATER,

- is *publici juris*, i. 624 n.
- and air compared, i. 624 n.
- falling from one man's eaves upon another's land, i. 677.
- nuisance by contaminating, i. 585, 633, 651 n.
- use of, is an easement, i. 647.

WATERCOURSE, i. 524 n., 612. (See DAMAGES, DECLARATION, DETENTION, EMINENT DOMAIN, EVIDENCE, IMPLIED DAMAGES, OCCUPANCY, PARTIES, PRIORITY, RIPARIAN PROPRIETORS, RIVER, VARIANCE.)

- as an enclosure, i. 550.
- nature of title to, i. 612, 619 n.
- what is a, i. 615.
- mutual rights and liabilities of owners upon, i. 618, 638.
 - are *ex jure naturæ*, i. 619 n.
- rights of possessor as against a stranger, i. 524 n.
- lawful use of; priority of use, i. 624, 628.
- damages for injury to rights in, i. 626.
- nature and amount of injury, i. 627.
- injury to, by a municipal corporation, ii. 388.
- lawful uses of water — irrigation, &c., i. 629.
- exhausting the stream, i. 630.
- corrupting the stream, i. 633.
- statutory authority, i. 634, 643.
 - when statutes do not apply, i. 645.
- obstruction of, i. 614 n.; ii. 230 n.
 - right to erect dams, i. 613.
 - license, i. 637.
 - opposite owners, i. 618 n., 639.
- flowage, i. 78, 539, 613, 634, 640.
- ancient right — prescription, i. 629, 647.
 - use must be adverse, i. 647.
 - reasonable, i. 650.
 - uniform, i. 650.
- abandonment or disuse, i. 654.
- remedies, i. 77, 613, 657.

WATERCOURSE, — *continued*.

- remedies — bill in equity, i. 624 n., 656.
- abatement, i. 657.
- trespass or case, i. 92 n., 613.
- parties, i. 658.
- subterraneous, i. 621.

WATER-POWER,

- what is, i. 618 n.

WATERWORKS COMPANY,

- liability of, ii. 395.

WAYS. (See **HIGHWAYS**, **RIGHT OF WAY**, **TOWNS**.)**WEIR**,

- nuisance in case of, i. 70.

WELL, i. 119, 622 n.; ii. 234 n., 313. (See **RAILROAD**.)**WHARF**,

- obstruction of, i. 69.

WHARFINGER. (See **BAILMENT**.)**WHORE**,

- charge of being a, i. 278, 280.

WIDOW. (See **WASTE**.)**WIDTH OF ROAD**,

- liability for, ii. 365.

WIFE, (See **HUSBAND**.)

- as witness in case of malicious prosecution, i. 484.
- possession of, i. 568.
- conversion by, ii. 503.
- devastavit* by, ii. 505.
- fraud by, ii. 505.

WILD

- lands, possession of, i. 551.
- hunting and encamping on, i. 118 n.
- geese, i. 506.

WINDFALLS, ii. 88 n.**WINDOWS**. (See **LIGHTS**.)**"WITHOUT IMPEACHMENT OF WASTE,"** ii. 88.**WITNESS**,

- competency of wife as, in actions for malicious prosecution, i. 484.
- case against, for disobeying a subpoena, i. 77 n.
- not liable in tort for false testimony, i. 86.
- arrest of, *eundo vel redeundo*, ii. 127.
- action against, for not appearing, i. 146.

WOOD. (See **DRIFT-WOOD**.)**WORDS**, (See **LIBEL**, &c.)

- no justification of assault, i. 197.

WORK. (See **NEW WORK**, **PUBLIC WORKS**.)**WRECK**,

- title to, i. 498.

WRESTLING,

injury in, i. 195.

WRIT. (See MALICIOUS.)

abuse of, i. 447.

return of. (See RETURN.)

trover for, ii. 60.

what, will protect an office, ii. 189.

WRITING. (See HANDWRITING.)

WRONGFUL

excavation. (See EXCAVATION.)

levy. (See TRESPASS.)

possession. (See POSSESSION.)

purchase. (See PURCHASE.)

recording. (See RECORDING.)

sale. (See SALE.)

taking — whether necessary to trespass, ii. 5.
trover, ii. 245.

Y.

YATES *v.* LANSING, Case of, ii. 103.

END OF VOL. II.

